



# **NAVAL POSTGRADUATE SCHOOL**

**MONTEREY, CALIFORNIA**

## **THESIS**

**NO FAILURE OF IMAGINATION: EXAMINING  
FOUNDATIONAL FLAWS IN AMERICA'S HOMELAND  
SECURITY ENTERPRISE**

by

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September 2011

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**NO FAILURE OF IMAGINATION:  
EXAMINING FOUNDATIONAL FLAWS IN  
AMERICA'S HOMELAND SECURITY ENTERPRISE**

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## **ABSTRACT**

Current United States (U.S.) policy vis-à-vis the nation's homeland security enterprise is built on a fatally flawed foundation. It is based on a top-down, federal-centric model rather than on a constitutional model that develops capability for resilience, response, protection and preparedness for crises.

The issues leading to this flawed foundation go back to the inherent constitutional tension between the federal and state governments. Historically, when confronted by national-level crises, the federal government has based its actions and mandates on flawed metapolicy addressing all possibly related issues, rather than directing effort at solving the major crisis at hand. In so doing, the preemption of power, and the coercion through funding and regulation have been results unto themselves.

The crisis that encapsulates homeland security today is as wide and amorphous as the crisis confronting America at the time of the Great Depression. Both crises involve Constitutional, social, financial, and political issues of extreme complexity. In addition, both resulted in significant expansion of federal prerogatives.

This thesis seeks to examine the metapolicy behind the reaction to such severe and yet amorphous crises and to suggest courses of action that—within the bounds of existing political reality—can redirect today's homeland security enterprise in a more effective manner. The research looks at historical and legal concepts, and conducts an in-depth review of similarities between the New Deal era and the modern homeland security era.

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## **LIST OF ACRONYMS AND ABBREVIATIONS**

AAA	Agricultural Adjustment Act
AHP	Analytic Hierarch Process
CBO	Congressional Budget Office
CBRNE	Chemical, Biological, Radiological, Nuclear, and Explosive
CCC	Civilian Conservation Corps
CCP	Citizens Corps Program
COA	Alternative Courses of Action
CRS	Congressional Research Service
CSIS	Center for Strategic and International Studies
CWA	Civil Works Administration
DHS	Department of Homeland Security
DL	Driver's License
DLSGP	Drivers License Security Grant Program
DoD	Department of Defense
EMPG	Emergency Management Performance Grant
EOC	Emergency Operations Center
EPAP	Equipment Purchase Assistance Program
ERM	Enterprise Risk Management
FBI	Federal Bureau of Investigation
FDIC	Federal Deposit Insurance Corporation
FDR	Franklin Delano Roosevelt
FEMA	Federal Emergency Management Agency
FERA	Federal Emergency Relief Administration
FHA	Federal Housing Administration
FISA	Foreign Intelligence Surveillance Act
FSA	Farm Security Administration
FY	Fiscal Year
GAO	Government Accountability Office
HLD	Homeland Defense
HLS	Homeland Security
HMGP	Hazard Mitigation Grant Program
HOLC	Home Owner's Loan Corporation
HSAS	Homeland Security Alert System
HSGP	Homeland Security Grant Program

IBSGP	Intercity Bus Security Grant Program
IC	Intelligence Community
ID	Identification Card
ISAC	Information Sharing and Analysis Centers
MMRS	Metropolitan Medical Response System
NFIP	National Flood Insurance Program
NLRA	National Labor Relations Act
NOAA	National Oceanographic and Atmospheric Administration
NRA	National Recovery Administration
NSGP	Nonprofit Security Grant Program
NYA	National Youth Administration
OIG	Office of the Inspector General
OPSG	Operation Stonegarden Grant Program
PDD	Presidential Decision Directive
PKEMRA	Post Katrina Emergency Management Reform Act
PSGP	Port Security Grant Program
PWA	Public Works Administration
QHSR	Quadrennial Homeland Security Review
REA	Rural Electrification Administration
SEC	Securities and Exchange Commission
SHSP	State Homeland Security Program
SSA	Social Security Administration
TSA	Transportation Security Administration
TVA	Tennessee Valley Authority
U.S.	United States
UK	United Kingdom
USA PATRIOT	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism
WPA	Works Progress Administration



## **DEDICATION**

This thesis is dedicated to the memory of my parents, Donald and Debra Freed, who instilled in me curiosity, a love of learning, a need to discover, and the willingness to stand up and say what I believe.

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# **I. INTRODUCTION**

## **A. PROBLEM STATEMENT**

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. (United States Constitution, 1787, Preamble)

Current U.S. policy vis-à-vis the nation's homeland security enterprise is based on a model that reflects the desires of the federal government (top down), rather than a constitutionalist model based on development of the capabilities based on need at the state/local level. This research works to expand the general knowledge base upon which the Homeland Security (HLS) enterprise has been constructed.

The seminal issues in American governmental history have revolved around the tension between the branches of the federal government itself and the tension between federal power and state governments. It can be argued, as “Brutus” did as the author of Anti-Federalist 32 (1787) that such tension is an intentional part of the U.S. Constitution and the resulting governmental structure of the nation. Primarily during the latter portion of the 20th century until today, the Supreme Court has taken on the mantle of policing the interplay concerning the separation of powers and checks-and-balances concepts of the Constitution through its decisions (Cornell Legal Information Institute, 2011a, p. 64).

The Constitution, seeking to secure those “blessings of liberty,” separates powers between the three branches of the federal government, and between the federal government and the states. Importantly, though, the Constitution is based on the idea that these separated powers will work to integrate the separate activities of each branch and level of government to create a functioning governance structure or, as the Supreme Court found, “separateness but interdependence, autonomy but reciprocity” (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579). The relationship between the powers of the federal and state/local governments has changed over the years from compact theory (in

which the federal government exists as a compact between the states), to dual sovereignty (in which state/local and federal governments exist in separate, supreme spheres of power, each derived directly and independently from the people), to more modern models of federalism in which the powers of the federal government are interpreted to overlap that of the states (Woolhandler & Collins, 2009). This dual federalism was supplanted in the 1930s by Supreme Court cases, such as *United States v. California* (297 U.S. 175 (1936)) that eliminated any limits on Congress' regulation of commerce when such federal regulations conflicted with state laws—thus “preempting” the state's powers (FindLaw). The tensions and conflicts inherent to this arrangement are critical to U.S. homeland security policy.

Since the terrorist attacks of 2001, the United States has worked to create a HLS enterprise across both the federal and state levels. One of the major steps taken at the federal level to date was the establishment first of a federal Office of Homeland Security and later the Department of Homeland Security (DHS). This department brought together 22 federal agencies under an overarching cabinet-level secretary in an effort to coordinate disparate functions into a common mission space, which was summarized succinctly by the Homeland Security Council in the second National Strategy for Homeland Security (Homeland Security Council, 2007) as working to “ensure our long-term success” as a nation. Executing the goal of achieving mission success has required a near-constant stream of federal mandates to the state and local governments. The framework under which this enterprise functions relies not only on federal agencies, but also on the response and actions of ‘partner’ agencies at the state and local government level, from the private sector, nongovernmental agencies, and individual citizens.

Congress and the people demand some assurance that efforts undertaken achieve measurable goals (Reese, 2009). However, the current and evolving structure resulting from the enterprise has proven impossible in which to measure outcomes effectively (Reese, 2009). It can be asserted that unprecedented federal oversight and multitudes of federal laws, hearings, and investigations that have resulted in massive interference by the federal government in the operation of local and state agencies, has not facilitated the achievement of the goals of these various oversight bodies. The top-down, one-size-fits-

all federal mandate method has resulted in a system of systems that duplicates effort of various jurisdictions competing for grants, and thus runs, counter to the letter and intent of the Constitution.

In 1991, researchers wrote about the failures of the federal response following Hurricane Hugo in terms of consequences that could be inserted directly into the criticism that followed Hurricane Katrina (Waugh, 1991), an indication of how little HLS has changed. Despite decades of oversight and modification, growth and consolidation; and despite the vast expenditure of tens of billions of federal dollars, can the nation today demonstrate exactly how it has progressed? The national enterprise has changed in organization and name to “Homeland Security.” Yet, no clear understanding of what Homeland Security *means* exists.

Definitions and taxonomy have evolved since 9/11—abandoning time-proven techniques and creating new, federally determined, top-down mandates and federal rules and powers (Tierney, 2007). The motivation for this effort is unclear. Conspiracy theories aside, this paper demonstrates that preemption is the consistent trend in governmental functions at least since the New Deal, and examines the impact of this trend on the development of an arguably flawed national homeland security policy, which ignores the local needs of the several states.

In the aftermath of crisis, the resiliency of the states’ governments and their ability to function and to recover locally is part of the key to the larger national response to crisis. The inability to apply metrics to state and local (and by extension, federal) preparedness is the direct result of a flawed foundation. Within this enterprise, the federal government tasks multiple state and local agencies with aspects of preparedness, response, recovery and mitigation. Federal grants available to pay for the multiplicity of new responsibilities required by the federal government lends to the federal government the power to coerce.

While states share some similar risks and threats (severe weather, the possibility of terrorism, hazardous materials releases), each state’s vulnerabilities to these threats differ (Minnesota is not subject to a tsunami, Hawaii is not at risk of a blizzard).

Consequences of the threats differ as well (the explosion of five pounds of TNT in a sparsely populated area would be significantly different than it would be in the confines of Las Vegas). Yet, the self-assessment tools for HLS capacity measurement do not differentiate based on risk or any other factor (Responder Knowledge Base [RKB], 2011a).

This research shows that the very term “Homeland Security” lacks a firm definition and that the term has evolved in meaning since coming into the public discourse following 9/11; that the concept of risk is poorly interpreted; and that the enterprise itself is poorly designed. The nation was founded on specific principles regarding the interplay between the levels of government to achieve the appropriate provision of public “goods,” including national security. If providing for the “common defense” and ensuring national success are national goals, and if (as seems the case) the United States is unable after ten years of significant effort and expenditure to identify progress clearly, it is necessary to examine the causes of this failure to identify a “better” way.

## **B. RESEARCH QUESTIONS**

### **1. Primary Question**

Can useful conclusions be drawn about the efficacy of the policies behind the HLS enterprise as currently construed through an examination of the parallels (if any) between national response to the crisis centered upon the Great Depression and the national response to the crises engendered by the attacks of 9/11 and the catastrophe of Hurricane Katrina?

### **2. Secondary Question**

In examining the primary question, several secondary questions need to be evaluated. First, what is HLS? To comment upon a thing, it is essential to identify what that thing is. Federal definitions of HLS changed on 9/11 and evolved again following Hurricane Katrina. In each case, the federal government has exerted additional control



and imposed additional mandates on the states. Thus, an evident correlation between the changing definitions of HLS and expansion of federal authorities over the states does exist.

Is there, however, a causal relationship between national crisis and preemption? If there is causation, what is the nature or motivation for this and would closer adherence to fundamental constitutional principles result in a more responsive and effective enterprise?

More importantly, what are the ramifications of motivations behind the policies governing national response to a crisis?

- Is it necessary to wait another 40 years to see the ramifications of addressing a crisis with the extension of executive power?
- Alternatively, are the ramifications of these choices through the example of past preemption already seen?
- Finally, are there potential actions to address these issues within the world of political reality, and without wasting all of the efforts to date?

### **C. ARGUMENT**

The current HLS structure is inherently flawed. These flaws are the result of several issues. First, America's HLS enterprise structure is ill conceived and conflicts with the constitutionally defined roles of the federal and state governments. The root of these flaws is found in the rationale behind policies ostensibly enacted to respond to a specific crisis. The resulting enterprise has been, and remains, unable to succeed.

Second, the lack of clear definitions exacerbates these structural flaws, which makes any accurate assessment and measurement of progress and the impact of HLS efforts impossible, and subsequently, leads to waste and missed opportunity. This shortcoming sustains America's vulnerability.

The solution to these problems is to understand America's HLS enterprise in terms of its consistency with the intent of the Constitution, and the intent of various establishment laws governing HLS and to set policy based on meeting the crisis at hand. Only after coming to grips with the constitutional context of homeland security can the nation contemplate politically viable changes to the system that would (a) leverage any

successes achieved to date through the massive federal grants; (b) utilize the constitutionally created federal system's strengths in a manner in line with the intent of the framers of that document; and (c) strengthen the states' ability to respond to and recover from major emergencies so that they in turn would be better able to assist each other and the nation overall in times of need.

#### **D. SIGNIFICANCE OF RESEARCH**

This thesis fills the gap between the stated, and self-evident, need for a coordinated national HLS enterprise and the observed problems with reaching that goal by positing a constitutional approach to the enterprise. Local, state, and federal leaders—elected and appointed—might thus develop strategies to enhance the real preparedness of the United States. Future policy development would be based on a consistent set of terms and processes, grounded in achievable political reality and based on the foundation crafted by the authors of the Constitution.

Previous research and reports assessing the gaps in preparedness of the United States document problems, failures and shortcomings. Little information about the foundational flaws in policy at the heart of these issues exists. Cosmetic changes cannot repair these foundational problems, nor is a complete restructuring a viable option.

#### **E. RESEARCH METHOD**

The primary methodology for this research is to examine the existing literature and to review the historical and legal actions of the federal government in response to crisis vis-à-vis the federal structure enumerated in the Constitution and the definitions and goals of the enterprise. A comparative review of records relating to the issue of preemption leading up to and following 9/11 and Hurricane Katrina, and of the resultant impact on national resilience, will prove instructive.

The process involves several steps. The first is to identify the terms upon which the enterprise is based. While justification for the adoption of a single, explicit, definition of specific concepts exists, the purpose is to provide a frame of reference for policy makers to judge the efficacy of the proposed changes and solutions.

The second parameter of the research is to identify the basis for the structures and requirements of the HLS enterprise in the United States vis-à-vis the Constitution and to examine the potential motives behind this basis, which serves to form a foundational understanding upon which change can be constructed.

Analysis of historical and current federal policies and requirements will lead to an understanding of national HLS needs, and an analysis of federal structure will identify the roots of state needs and how the states can more effectively contribute as part of a national enterprise.

Finally, the research provides a solid theoretical basis upon which specific policy recommendations can build a more effective HLS enterprise within the realities of existing political realities.

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## **II. LITERATURE REVIEW**

[T]he knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. (Hayek, 1945)

A vast array of governmental policy documents and assessments of these policy documents are available for review. Similarly, references regarding the impact on America's preparedness are in the public record. This project evaluates the literature in four major categories: definitions of HLS imperatives, assessment of the current HLS structure, assessment of the tension between the federal HLS mandates and the states, and the record of previous research regarding the efficacy of HLS as currently designed.

### **A. ASSESSMENT OF THE CURRENT STRUCTURE AND DEFINITIONS**

A robust record exists on the pursuit of a nationwide policy on HLS in America. The DHS itself has completed its first Quadrennial Homeland Security Review, and much has been made of this document—both its strengths and its weaknesses.

Congressman Christopher Carney, however, has stated that the Quadrennial Homeland Security Review was missing any “discussion of the status of cooperation between the Federal Government and State, local, and tribal governments in preventing terrorist attacks and preparing for emergency response to threats to national homeland security” (Carney, 2010). He has not been the only voice indicating a need to identify the status of the U.S.'s preparedness in homeland security matters before or since.

The term homeland security was not a part of the American lexicon prior to 2001. Since that time, a great deal has written using that phrase.

A significant portion of the literature addresses the structure of homeland security in the United States. Much of this literature is in the form of government documents, such as Congressional Research Service (CRS) reports, testimony of government officials, and federal and state laws, standards, and guidelines. Literature specific to the concept of federalist-based HLS is sparse, and thus, requires a broader approach.

The United States Commission on National Security in the 21st century (popularly called the Hart-Rudman Commission after its co-chairs, Gary Hart and Warren Rudman) issued a report entitled *New World Coming: American Security in the 21st Century*. The report presaged the 9/11 attacks, which declared the inevitability that terrorists would attack America on American soil with huge civilian loss of life (The United States Commission on National Security in the 21st Century [Hart-Rudman Commission], 1999, p. 4).

Similarly, the *Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction* (the *Gilmore Commission*, named after Chair James Gilmore) also convened in 1999. Reacting to the 1993 World Trade Center bombing and the destruction of the Murrah Federal Office Building in Oklahoma City in 1995, the Gilmore Commission recognized the increasing threat of asymmetrical attacks using weapons designed to inflict catastrophic damage used without regard to the so-called laws of war. The commission recognized the need for federal authorities to engage state and local responders (Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction [Gilmore Commission], 1999, p. vi).

## **B. PREEMPTION AND HOMELAND SECURITY POLICY**

Commentary and evaluation of the role of government and public safety entities, as well as structural issues between the states and the federal government, are also key to the consideration of the topic. In addition, observations about key concepts, such as risk, must be considered. First, however, the very concept of national preparedness in a federal form of government must be explored to discover measurable parameters and the metrics necessary to assess the status of such preparedness.

Article VI of the United States Constitution (in which the “Supremacy Clause” is found) states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (United States Constitution, 1787)

While the 10th amendment to the Constitution reserves those powers not explicitly enumerated for the national government to the states, Congress has used its constitutional power over interstate commerce (Article I; Sec. 8; Clause 3) that has been used for many years to regulate state power and as a means to mandate activities by the states to ensure that states assist in national-level activity (Cornell Legal Information Institute, 2011b) on the grounds that activities that affect such commerce are under the purview of the federal government. In 1937, the Supreme Court ruled in *NLRB v. Jones and Laughlin Steel Corporation* that activities leading up to interstate economic transactions were under the same congressional control as were the transactions themselves (Thomas, 2003, p. 6). In *New York v. United States* (505 U.S. 144 [1992]) the Court clarified this power in ruling that Congress may not usurp the legislative authority of a state so as to force that state to execute federal activities that are in essence federal responsibility (Thomas, 2003, pp. 14–15). *Garcia v. San Antonio Metropolitan Transit Authority* also upheld a state’s prerogatives by ruling that disputes over the effects on state sovereignty of federal commerce clause legislation are political questions (Gilmore Commission, 1999, pp. 9–15). In *Reno v. Condon*, the Court ruled that while Congress may require states to act on a federal mandate, Congress may not dictate the methods by which the states choose to behave (Gilmore Commission, 1999, pp. 9–15). With these and other cases, the Court appears to have strengthened the role and importance of the states in the federal system, but other information shows that the tension continues.

In a presentation to the Center for National Policy in April 2010, Federal Emergency Management Agency (FEMA) Deputy Administrator for National Preparedness Timothy Manning (2010) indicated that an obvious need exists to work

with individual states in an individualized approach to national preparedness. Manning opined that there “are differences [between the states] and I think we need to be sophisticated enough in the way we develop these programs to recognize and embrace these differences” (Manning, 2010). Despite Mr. Manning’s acknowledgments, measurement of HLS progress at both the individual state and at the national level has remained problematic. One cause of this difficulty is the seeming abandonment of a classic federalist approach in favor of a top-down, federal-centric approach.

### **C. THE TENSION BETWEEN FEDERAL AND STATE GOVERNMENT**

As Clovis (2007) reported, every senator and 412 of the 435 members of the House of Representatives sit on one or more committees with HLS oversight. This level of oversight and “input” leads to conflicts of methods, missions and metrics. An inherent tension also exists between the state and federal governments. The priorities of state policy makers do not always mimic the priorities of federal policy makers (Clark, Beacham Jr. & Adams, 2008). Whereas federal policy makers have identified 15 major planning scenarios upon which HLS funds are to be expended,<sup>1</sup> states have completed Department of Homeland Security mandated mitigation plans that include state-specific hazard assessments. Baker McNeill reported agreement between Congress and subject matter experts that the 108 committees, subcommittees, and commissions having oversight of HLS have created a system that is untenable and based upon “conflicting messages from Congress [that] often impede policy implementation” at the state and local levels (Baker McNeill, Carafano, Mayer, & Rosenzweig, 2010, p. 1).

Upon examining critical HLS components separately (rather than looking at the enterprise overall), the tension between the needs at a local level versus the needs for the full national governmental level are evident. In the case of intelligence analysis, for instance, Lowenthal (2005, p. 221) wrote that policy makers intelligence needs “are not necessarily the same thing as formal ‘intelligence requirements’.” George Washington, in

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<sup>1</sup> The national planning scenarios include nuclear detonation, anthrax, pandemic influenza, plague, blister agent, toxic industrial chemicals, nerve agent, chlorine tank explosion, major earthquake, major hurricane, radiological dispersal devices, improvised explosive device, food contamination, foreign animal disease (foot and mouth disease), and cyber attack.



his farewell address, warned the young United States about the need to preserve and work with the difference between state government and national government priorities through the Constitutional separations. “It is important,” he wrote “that...those entrusted with [a free country’s] administration...confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another” (Washington, 1797). Further, Washington warned that the distribution of action between the federal and state governments was essential and must be preserved (Washington, 1797).

Echoing Washington’s warning, Carafano and Wietz (2009, p. 2) wrote that failure to understand the effects of discrete decisions upon the whole of a complex system, such as DHS, “can produce unintended and counterproductive consequences.” Baker McNeil et al. argued that the more than \$30 billion spent on federally directed HLS efforts since 9/11 have not merely produced hard-to-measure progress, but rather have yielded “weak” results due to the federal assumption of traditionally state-centric roles. She declared that states are better suited at directing the HLS enterprise than is the federal government (Baker McNeill et al., 2010, p. 2).

#### **D. CRISIS AND ENCROACHMENT**

The literature reflects problems with the interaction between the federal and state governments. Interestingly, Eisinger (2006) argued that HLS requires more centralized leadership and that state or local based activity in the arena is a fundamental flaw requiring highly centralized control. He thus represented the view of HLS as terrorism-centered. Lawson and Granger (1993, p. 271) countered however, that the Supreme Court in *McCulloch v. Maryland* and other cases has subsequently asserted that the federal government need only show the barest link between the federal need and the legislative means of achieving these ends. The court intentionally neglected the fact that the so-called “Sweeping Clause” requires federal intrusion locally to be both “necessary and

proper” (United States Constitution, 1787, Art. I. Sec. 8. cl.18).<sup>2</sup> Indeed, the Sweeping Clause and the Commerce Clause are the root of the powers assumed by the Roosevelt administration in the construct of the New Deal (Schlaes, 2007).

Clovis (2008a) has documented the fact that throughout history, nations tend to centralize power in times of crisis. It can be fairly argued that the Franklin Delano Roosevelt (FDR) administration addressed the economic crisis of the Great Depression by enacting sweeping changes on the American body politic, which were centered on social and economic changes (Schlaes, 2007; Romer, 1992). More controversial is the argument that these changes were either necessary reforms to safeguard the nation, or an intentional seizure of power from the states in a conscious attempt to restructure the constitutional balance of power and experiment in social engineering (Romer, 1992; Vernon, 1994).

For example, the Emergency Banking Act passed Congress in less than an hour and almost without debate, and on the House side, only one Congressman even had a copy of the act (Phillips, 1994, p. 42). While the act achieved a necessary goal, it also resulted in sweeping changes to the role of the federal government in the banking system that persists to this day. FDR’s desire to ensure that his “reforms” would pass constitutional muster was obvious (Tushnet, 2008). Recall that, following his reelection, FDR proposed to reform the Supreme Court by granting to the President the ability to replace any justice older than seventy-five. Tushnet (2008) noted, however, that despite the obviousness of FDR’s attempt to usurp judicial power, the plan moved forward until then-Senate majority leader Joseph Robinson’s untimely death (p. 103). Despite early defeats of New Deal legislation in the Supreme Court, the FDR administration continued to reformat proposals, by “reaching deeply into areas states should regulate” (Tushnet, 2008, p. 104).

Indeed, the Court also worried about an insidious intrusion of federal power. Writing in dissent in 1937’s *National Labor Relations Board v. Laughlin Steel*, Justice

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<sup>2</sup> “The Congress shall have Power—To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

McReynolds observed that in the course of dealing with the then-current crisis, New Deal legislation would result in the view that “Congressional power would extend...into almost every field of human industry....A more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine” (Tushnet, 2008, p. 107). Whether the New Deal ends justified the means is beyond the scope of this research, but the impact of increased federal imposition of process upon the states that have followed—the formation of the DHS, the requirements of HLS grants, Target Capabilities List, the USA Patriot Act and more—are crucial in understanding of the HLS enterprise.

## **E. SUMMARY**

The problem of accurately assessing progress in homeland security in America reflects a substantial flaw in the system due to lack of definitions for some of the key concepts involved. A number of definitions have been offered for the key HLS concepts. However, these definitions tend to be vague or even contradictory. In some cases, definitions are simply ignored as semantics. The sheer volume of policy, law, hearings, and committee records demonstrate that HLS guidance has been directed (at least from the inception of the department) toward federally mandated priorities applied across all states. The literature points to the original intent of the Constitution as designed to emphasize the states’ role in their self-direction on internal matters, and the federal government’s role on overall homeland defense, and issues surrounding the interactions between states. The myriad of court findings reviewed in their historical context clearly show that the shift of responsibilities onto the states, and despite the periodic ebb and flow of politics, does not equate to decentralization or reversal of the preemptive trend (Clovis, 2008a).

At the same time, a subjective understanding exists that the billions spent on HLS since 9/11 (and before) have had some positive effect, no matter how difficult it might be to measure. The constitutional issues regarding the separation of powers have been debated almost since the signing of the document and greatly impact any conclusions regarding structure of the national enterprise.

The literature is wide ranging in its agreement that problems exist with the system as currently constituted. Some of the suggested courses of action require either a wholesale redesign of the entire system, changes in the nature of politics and politicians, or both. As such, it seems that solutions are rare.

Little discussion appears in the literature of the role of more traditional emergency management and the methods in place prior to 9/11. Waugh (1991) observed that in its response to Hurricane Hugo, the federal government recognized a “need for more attention to how the emergency management function is structured and where it is housed in the government, how the agencies are empowered.” These same criticisms were leveled after 9/11 and after Hurricane Katrina (Waugh & Streib, 2006). However, little acknowledgement actually appears in government literature that these problems are still endemic.

A concentrated effort to understand the structural causes of the lack of demonstrable progress does not appear to have occurred either. Old methods for managing emergencies have been largely discarded in favor of completely new structures geared toward the specific hazard of terrorism at the cost of billions of dollars. New tools and mandates for measurement have not solved the problem. No definitive proposals for realistic restructuring have been put forward.

The literature reveals that some researchers have theorized that massive changes in the very nature of elected U.S. officials might result in a different outcome. However, the fact remains that such a change is an unrealistic desire. Rather, this thesis proposes methods of developing an approach to America’s homeland security needs that can be accomplished without wishful thinking or a whimsical change in human nature, and without discarding the good work done since—or before—9/11.

### III. TERMS DEFINED

[D]oubtless, in the interpretation of nature, the mind is to be so prepared and formed, that it may both rest upon proper degrees of certainty, and yet conceive, especially in the beginning, that the things which are present have a great dependence upon those behind....because truth will sooner emerge from error, than from confusion. (Bacon, 1818, p. 216)

To conduct a study of any endeavor, it is critical that some boundaries be established for that study. Research into the issues surrounding America's HLS enterprise requires some commonality of terminology. The purpose of defining these terms in the scope of this research is not to require that the definitions be accepted universally but rather to provide boundaries and a level of internal consistency to the research. For example, if an individual were to conduct research into the properties of a red ball, it would be necessary to define for the reader the size and type of ball, as well as the operational environment in which the research was conducted.

Similarly, to discuss "homeland security," "risk," or the other terms used in the HLS lexicon, it is essential to define the size, shape, and composition of those terms. As professionals in other fields, such as law or medicine, strive to learn from one another, HLS professionals as well must "aspire to a common vocabulary and framework for analysis" to facilitate the exchange of information and understanding (Slaughter Burley, 1993).

This thesis argues that significant problems (or even a perception of failure) are inherent in the nation's HLS enterprise due to the reliance on the preemption of the state's prerogatives as a basis for establishing strategic HLS policy. It can be further argued that this problem results directly from the failure of the United States to define HLS, understand the nature or risk, and more importantly, a failure to address the threat crisis that faces the nation adequately. As the literature review—or for that matter, a search on the Internet—reveals, the term *homeland security* intimates many aspects of social, legal, political, and military activity.

Thus, an understanding of the scope of the research and of the intent of the meanings of terms used is necessary. For the current research, among the most critical terms discussed are “risk”—because it is upon this concept that the decisions of how to assign resources to protect the nation are made, “enterprise”—an oft-used term critical to the understanding of why various agencies and sectors are involved, and “homeland security” itself—because it is not possible to discuss a thing without knowing what is being discussed.

#### **A. ENTERPRISE**

The term “enterprise” is widely used in American discourse. It has significant sociological and economic definitions serving as both noun and verb. At its simplest, the noun “enterprise” is defined as a project or undertaking (*Enterprise*, n.d.) and public enterprise is any economic activity executed by government organizations (*Public Enterprise*, n.d.). *Black’s Business Dictionary* defined the verb “enterprise” to mean “initiative or willingness to take risks or take responsibility” (Enterprise, 2006) declaring further that an additional effort is often involved, or in other words, a willingness to “undertake new ventures.” The *Encyclopedia Britannica* defines a public enterprise as being an organization wholly or partially owned by the state and controlled by a public organization (*Public Enterprise*, n.d.).

For the present research, and to avoid undue tautology, the *American Heritage Dictionary of the English Language* (2007) definition combined with Black’s willingness requirement and concepts from *Merriam-Webster Online’s* (Merriam-Webster, 2011) definition is most apropos. This paper uses the term “enterprise” to mean “*an undertaking of some scope, complication, and risk requiring systematic purposeful activity and a willingness to undertake new ventures.*”

On its website, the U.S. Department of Homeland Security claims more than 87,000 agencies with a Homeland Security role exist in the United States today (United States Department of Homeland Security, 2010b) reflecting the fact that agencies in every level of government have some role in HLS. It is, therefore, obvious that Homeland

Security is—and has been since its inception—an undertaking of some scope, complication, and at least the perception of great risk. Equally obvious is the fact that a one-size solution cannot fit all.

How the nation decides to allocate scarce resources is critical. Decision theory itself is a critical concept based upon risk. Decision theory deals with choosing which actions to pursue when uncertain concerning what will happen afterwards (Bernstein, 1998). The issue, however, is not one of uncertainty. In the abstract, it is *known* that disasters will happen. The questions are: *where* and by what *cause*?

Rose (2009) reported that there is often “a tendency to consider only on-site impacts” of disasters and this neglects indirect impacts, such as economic consequences, and other events that multiply the effect. Moreover, such narrow understanding of the consequences ignores ramifications elsewhere, away from the impact site—and yet this emotional concentration on the on-site impact influences the concept of risk for government (2009). Thus, the immediate effects of a terrorist attack, such as the Oklahoma City bombing, tend to garner long-term attention and generate psychological impacts, whereas the overall effects of flooding in the Midwest might actually have a greater overall financial impact on the nation. Paige and Freed (2009, p. 13) concluded “the complexities of 21st century risk and the realities of a permanently changed economic environment must be balanced against the critical services provided by...government.”

However, for FY2010, some 60% of congressionally appropriated funding to state and local government for homeland security is directed to “terrorism focused programs” (Reese, 2009). Indeed, the Congressional Research Service cautioned Congress that the HLS structure places “undue emphasis” on terrorism-related hazards at the expense of more likely threats (Reese, 2009). It might be argued that maintaining a crisis-mode mentality might serve as a *casus belli* for enacting laws or rules that emphasize the executive’s role in dealing with threat.

This should not be interpreted to imply that terrorism is not a threat to the United States worthy of concentrated effort. However, no successful large-scale terrorist attack has occurred in the United States in the ten years since 9/11.

## **B. HOMELAND SECURITY**

A query of the Internet search site Google.com for “definition of homeland security” in August 2011 returned more than 5.5 *million* results. The overwhelming majority of these results dealt with the United States *Department* of Homeland Security rather than providing a basic understanding of the concept. Thus, with a general understanding in hand of what constitutes an enterprise, an understanding of America’s HLS enterprise specifically is needed. The term homeland security had rarely entered the American lexicon before 9/11. In the years since, government officials at all levels, as well as academics, pundits, and responders, have struggled to devise a firm definition.

Without a consistent definition, the nation has still worked mightily to create a homeland security structure or system—but it is amorphous and, it can be argued, prone to encouraging “mission creep.” Within the practitioners’ field, conflict has arisen over the proper design of the system and its components—the “enterprise,” as defined above. Any mission creep in the HLS enterprise in America results from this lack of common understanding about what the mission means. Is Homeland security a terrorism-driven field, or is it “all-hazard?” Is it strictly a governmental concern, or a partnership; is it a federal endeavor, or local? What agency should lead the effort?

The structure of the U.S. HLS enterprise is an amalgam of structures for four functional disciplines that pre-date 9/11 and Hurricane Katrina: emergency management, civil defense, war mobilization and counterterrorism. These structures have clearly had both interagency and intergovernmental (federal/state/local) dimensions. As recent events have proven, private sector entities, community organizations, and nongovernmental organizations are decidedly critical players (Morton, 2008, p. 6).

This amalgam is present not only for a nation-affecting calamity, but at the state and local levels as well. Public safety, health, defense, and local agencies—all have roles in the HLS enterprise.



The fact that the term “homeland security” is undefined adds confusion across all levels of government. Public service disciplines that for years have existed within their own “stovepipes” now have overlapping missions and compete for resources to attempt separately, and often competitively, to solve common problems.

The President of the United States, as Commander-in-Chief and the leader of the Executive Branch, is uniquely responsible for the “safety, security, and resilience of the Nation” (United States Department of Homeland Security, 2010a). The White House leads overall HLS policy direction and coordination. Individual federal agencies, in turn, are empowered by law and policy to fulfill various aspects of the HLS mission. Direct corollaries exist to the states’ HLS apparatus (Logan, 2007). For example, governors, as leaders of the states’ executive branches, bear the ultimate overall responsibility for the safety, security, and resilience of their states.

Governors recognized the responsibility resulting from the terrorist attacks in 2001 by acting swiftly (and without waiting for federal mandates) to establish state homeland security organizations. Then-Secretary of Homeland Security Tom Ridge spoke of the governors’ “substantial innovation and extraordinary leadership in the then-nascent war on terror (Ridge, 2003b). In each of the states and territories, individual state and local agencies are charged with executing various components of the HLS enterprise—without any common understanding of what HLS means.

Defining HLS and deciding which agencies are responsible for what aspects, and who coordinates these efforts, are the challenges. These decisions have vast political consequences and also run into conflicting requirements at differing levels of government. Effective action requires clear direction, however. The dissonant and sometimes inconsistent federal mandates concerning homeland security result in the risk of duplicated effort and wasted money. Dissonant and inconsistent mandates on the part of each state (between its agencies and to local governments) only worsen the problem posed by a lack of clarity.

Issues of design, oversight, and succession share one key question at the core of the HLS enterprise: what does “homeland security” mean? Discussing the enterprise

without understanding the term is counterproductive. The inevitable results are blurred lines of control and coordination, and blurred lines of communication and a lack of commitment from those involved (Radtke, 2010). To reach a definition, it is evident that an understanding of what is included in the enterprise is an essential first step.

In June 2001, the Department of Defense (DoD) examined a new concept it called homeland security (in contrast to the traditional DoD role of homeland defense). In this context, DoD identified HLS to include the various measures, primarily within the U.S.'s borders—taken to dealing with threats resulting from any type of hazard—not only terrorism (Andreozzi, 2001). Three months later, terrorism became the central focus and driver for introduction of the term “homeland security” to the public. One consequence of having a terrorist event as the genus of the HLS enterprise has been a significant concentration on terrorism prevention and response, which has led directly to concentrating on the efforts of law enforcement, and less directly on fire services. To some extent, “homeland security” is considered synonymously with “anti-terrorism.”

This bias persists. HLS grant funding is terrorism-centric with mandated percentages for law enforcement terrorism programs (See FY2010 and FY2011 Homeland Security Grant Program Guidance and Application Kits). Among the other effects of this terrorism-centric view were a spate of activity, spending, training, and introspection by first responders, and a scramble to become terrorism ready (and to obtain grant funding). In April 2010, the Congressional Research Service reported that the federal government had disbursed more than \$34 billion since FY2002 in homeland security grants, with the majority dedicated to anti-terrorism efforts (Reese, 2009). In turn, this has led to a duplication of effort by many of the disciplines involved (Hsu & Cohen, 2005; Schultz, 2009). Almost forgotten (or so it seems) was the original concept of including natural and other non-terrorist human-caused disasters.

An old adage of emergency management is that governments always prepare for the *previous* disaster. This concept is borne out in post 9/11 HLS legislative and policy activity designed to prevent another terrorist attack and to deal better with the consequences of one should it occur (National Commission on Terrorist Attacks Upon the United States, 2004). According to the Library of Congress (2002), more than 20

federal laws (excluding appropriations and authorization bills) were signed and nearly 30 resolutions approved by the 107th Congress in the year following the 9/11 attacks alone (more than 130 bills were introduced). A spate of homeland security and other Presidential Directives were also initiated; and homeland security strategies and special grants were promulgated, all in a hasty attempt to cope with whatever it was that allowed the attacks to occur. The assumption being that whatever planning was occurring was happening in a vacuum of multiple agencies working on their own in “stovepipes” or “silos.”

The 9/11 Commission Report disparaged stovepipe mentality, but neither the creation of the discipline of homeland security nor the creation of a Department of Homeland Security has succeeded in deconflicting these stovepipes (National Commission on Terrorist Attacks Upon the United States, 2004, p. 403). The conclusion from experience can then be drawn, that in the absence of clear definition and direction, the tendency of disparate government agencies is to identify their own definitions and directions for solving a given problem, with a concomitant duplication of effort and resultant conflicts. If the stovepipes are to be deconflicted, clarity must be provided.

Adding to the lack of clarity posed by an ill-defined federal homeland security structure has been the resultant multiplicity of funding streams and mandates to multiple agencies (each with a role in HLS) without a definition of what that term means.

Bellavita (2010) wrote, “homeland security means something different in each jurisdiction. It is a locally directed effort to prevent and prepare for incidents most likely to threaten the safety and security of its citizens.” Given the reality of America’s experience, the nation should consider homeland security from an all-hazards point of view (including natural hazards along with terrorism) in the enterprise structure. The Quadrennial Homeland Security Review (QHSR, 2010a, pp. 11–12) is less direct. It asserts that the enterprise “is a widely distributed and diverse—but unmistakable—national enterprise...[describing] the intersection of evolving threats and hazards with the traditional governmental and civic responsibilities of civil defense, emergency response,

law enforcement, customs, border control, and immigration” (see also, Lee, Logan, & Mitchell, 2007). However, this “I’ll know it when I see it” approach is simply too nebulous a concept upon which to build a foundation.

The 2007 National Governors’ Association Guide to Homeland Security referred simply to homeland security as “encompassing policy areas as diverse as border security, public health preparedness, and telecommunications” (Lee et al., 2007, p. i). That same year, the second National Strategy for Homeland Security concentrated solely on terrorism and terrorist attack as the role of HLS (Homeland Security Council, 2007, p. 3). The May 2010 National Security Strategy only served to add ambiguity:

We are now moving beyond traditional distinctions between homeland and national security. National security draws on the strength and resilience of our citizens, communities, and economy. This includes a determination to prevent terrorist attacks against the American people by fully coordinating the actions that we take abroad with the actions and precautions that we take at home. It must also include a commitment to building a more secure and resilient nation, while maintaining open flows of goods and people. (p. 10)

Even the DHS website is vague. According to DHS, homeland security is “focused on protecting the American people and their homeland.” This definition is so ambiguous that virtually anything might be included. Terrorism, floods and tornadoes, building collapses and bombs, hazardous materials and weapons of mass destruction all vie for attention, funding, and resources. All constitute threats to the American homeland.

As Greenberg (2009) noted, maintaining an all-hazards approach does not reduce the criticality of the threat of terrorism. Clearly, terrorism must remain one of the major foci of the federal government, and state and local agencies must receive support for their crucial part of the national enterprise (Greenberg, 2009). However, while maintaining an emphasis on preventing and responding to future *potential* terrorist attack, natural disasters are a *certainty* and are becoming more intense and costly, and must be the central concept of the HLS enterprise (Greenberg, 2009).

The seeming inability to reach a single consensus definition of terrorism is itself another problem of equating homeland security with anti-terrorism efforts. Increasingly,

social and political paradigms of terrorism reduce the term's usefulness. To one side of the socio-political spectrum terrorism definitions are invalid because, in the words of Noam Chomsky (2010), "the concept of "terrorism" must somehow be crafted to include their terrorism against us, while excluding our terrorism against them, often far more extreme" Iranian scholar and diplomat Ayatollah Mohammed Ali Taskhiri (1987) defined terrorism by saying:

There is a terrorism which threatens security, honour (*sic*), property and the like; there is a cultural terrorism which tears human identity apart, and leads to the abyss of perdition and aimlessness; there is an information terrorism which deprives man of his freedom to breathe in an unpolluted atmosphere. We can cite other types of terrorism such as economic terrorism, scientific terrorism, diplomatic terrorism, and military terrorism.

It is not the scope of this paper to settle this issue, although future researchers should look to do so. Rather, the issue is illustrative of the ambivalence inherent to the argument over the scope of a HLS enterprise. It is not possible to decide what terrorism is, yet homeland security is tied to that term.

Thus, to arrive at an acceptable definition of HLS, it is necessary to view the full scope of the concept. The Project on National Security Reform (2008) while looking at the issues, reiterated what DoD had determined seven years prior that HLS must consider not only terrorist threat to the national security, but the traditional concerns of all-hazards emergency management as well (Morton, 2008, p. 6). Its finding that an "all hazards" approach was "necessary" was further developed when they wrote, "while different presumed stakeholders have their own delimitations of scope for homeland security, current expectations necessitate including within that scope catastrophic natural, medical or technological" events.

Finally, at this stage in the development of a HLS enterprise and related policies, the definition of HLS must encompass political reality. Examining the existing system by defining it in such a way as to make that system impossible, or by requiring such changes as to make the enterprise politically impractical, would leave the research without value.

Keeping this in mind, homeland security is defined in this thesis as the governmentally-directed activities within the borders of the nation that encompass the active and passive measures taken to protect the population, area, and infrastructure of the United States by preparing for, deterring, defending against, and mitigating the effects of threats, disasters, and attacks. The HLS enterprise consists of those governmental agencies, activities, and departments, and such non-governmental organizations that are specifically, purposefully, and systematically engaged jointly in the difficult tasks of ensuring the protection of processes of the American nation within its borders.

Under this definition, activities conducted *outside* of the United States are Homeland Defense (HLD) activities. A great deal of interaction occurs between HLD and HLS, and in some cases, a mutual dependence. Entities, such as the Federal Bureau of Investigation (FBI) (and to a growing extent, the Department of Defense) and others, execute both HLD and HLS activities. Specifically, the defeat of terrorism is not synonymous with HLS; it is a component goal of the HLS enterprise, as is activity developed around natural disaster scenarios.

The 2008–2013 Strategic Plan for the U.S. Department of Homeland Security did in fact include all-hazards references (United States Department of Homeland Security, 2008b, p. 4). The National Governors Association informed new governors that while their state-based HLS efforts should encompass “disciplines not traditionally part of public safety,” the structure should be all-hazards in approach (Lee et al., 2007, pp. 6–11). The July 2010 Bottom Up Review Report from DHS, however, indicates non-terrorism related activity as last in their list of core missions, almost as if it were an afterthought (United States Department of Homeland Security, 2010c, p. x).

Future researchers might refine the definition used in this thesis. However, in doing so, those researchers need to keep in mind the concepts of enterprise risk and the reality that projects formed without well thought out limits are impossible to complete and will never fulfill their intended mission. These putative researchers must also bear in mind the federal structure of the United States. In the aftermath of catastrophic emergencies or situations of imminent danger like acts of terrorism, the ability of state

and local governments to function and to recover (and thus remain a part of the national HLS enterprise) locally is in large part the key to a national response to larger scale events (United States Department of Homeland Security, 2008a).

### **C. RISK**

I have never disdained, even for a trifling stake, to throw the bloody die with my gallant comrades; and shall I hesitate now, when all that is most precious in life is set upon the cast? (Goethe, *Egmont*)

Response to crisis is a response to risk, which, in turn, requires decisions about acceptable courses of action. Does an entity spend to limit or eliminate a risk, insure against an occurrence, transfer the risk, or simply accept it as part of the course of business? In the management of national risk, critical decisions, such as these, are common (Bernstein, 1998). How decisions are reached can be critical.

Keeney's (2001) approach to decision making provided a methodology for analyzing trade-offs in 'values, and asserts that to achieve security, the nation accepts a degradation of some values in favor of others. In what he called "Error 1," Keeney articulated that nations actually care about the consequences of such trade-offs, but fail to minimize them due to an "incomplete understanding of all the fundamental objectives" of the policy necessitating the trade-offs (Keeney, 2001).

The concept of risk is important to the discussion of HLS policy because of the calls and requirements to base HLS financing on risk assessments (Reese, 2009). HLS costs (excluding overseas wars) have increased \$360 billion since 2001 driven largely by the fear of terrorism (as opposed to analysis of the terrorism risk) and based on highly flawed concepts of risk (Mueller & Stewart, 2011, pp. 2–3).

Mueller and Stewart (2011, p. 4) noted the insistence of Homeland Security Secretary Janet Napolitano for a measurable process for risk management to identify progress against risk requirements for making rational judgments about courses of action—and yet—the nation has failed to identify metrics. The inability to apply metrics to state and local (and by extension, federal) preparedness is the direct result of a flawed foundation (Clovis, 2008a). Within this enterprise, the federal government tasks many

agencies at the state and local level with aspects of prevention, preparedness, response, recovery and mitigation (United States Department of Homeland Security, 2008a). The requirements of federal grants intended in part to pay for the multiplicity of new responsibilities required by the federal government lends to the federal government the power to coerce (Posner, 2007).

## **1. Trading-Off**

While the terrorism prevention arena must continue to receive adequate attention (and funding), the response, recovery, planning, and mitigation arenas must also be addressed. Failure to determine what trade-offs of values exist in various courses of action, makes informed choices as to the acceptance of levels of risk difficult or impossible (Keeney, 2001). Former United States Secretary of Defense Robert Gates stressed that the nation's record of deciding which risks must be dealt with is perfect—the nation has never guessed correctly (Gates, 2011).

Maplecroft, a global risk intelligence and analysis firm, ranked the United States as being only at moderate risk for terrorism in 2010–11 (Carpenter, 2010, pp. 5–7), which is well behind Spain, China, and the United Kingdom (UK). Another independent global risk assessment firm, Aon (2010), concurs, also ranking the United States as being at moderate risk of terrorism from both transnational and domestic/single interest terror groups. The UK, which faces a proven threat from internal terrorism greater than that of the United States, spends less than half as much proportionately on HLS than does the United States (Mueller & Stewart, 2011, p. 22). At the same time, the National Climactic Data Center reports (2011) that individual natural hazard events resulting in losses of \$1 billion or more are relatively common.

To an extent, this concentration on terrorism, and the express requirement that homeland security grants affect a terrorism nexus, is in contravention of the law establishing the U.S. Department of Homeland Security. In the legislation, Title I, Section 101 of the Homeland Security Act of 2002 (Public Law 107–296) requires not only that the new department act “as a focal point regarding natural and manmade crises



and emergency planning,” but that DHS also take steps to “ensure that the functions of the agencies and subdivisions, within the Department that are not related directly to securing the homeland, are not diminished or neglected.”

Since 9/11, the United States has reasonably sought to assign limited funds and resources based on risk. The accepted risk definition by the U.S. government, however, is based on “attack” (GAO, 2006). The problem is that this presupposes that attack is itself the greatest risk. The evidence points to the contrary. Terrorism in general (attack in particular) is a significant risk, but it is not the most likely. As shall now be examined, this terrorism-centricity is a flaw in thinking about how best to secure the homeland.

## **2. Flaws Based on Probability Neglect**

In 2008, the United States Government Accountability Office (GAO) reported, “the Department of Homeland Security (DHS) has established a risk management framework to help the department target its investments in security programs based on risk. This framework defines risk as a function of threat, vulnerability, and consequence” (GAO, 2008, p. 1). This statement is not earth shaking news.

The greatest problem with fully utilizing a risk management model is that such models are so numerous that they are easily misunderstood or over simplified. Kallman (2010) has indicated that objective risk, the discipline most often applied in finance, statistics, and risk management—may be defined as “the variation from the expected outcome over time.” Other definitions exist as well for subjective, pure, and speculative risk—to name but a few (J. D. Kallman, personal communication, August 5, 2010).

As to the measurement of risk, Kallman (2010) has further identified that many formulae may also be used, such as computations of the coefficient of variation (CV), which is the standard deviation over the mean. While all measures have problems, the CV at least includes the key risk concept of variability as indicated by the standard deviation. Moreover, the CV is neutral in that it is not restricted to involving only threats.

DHS relies on another common, but more simplistic, formula for risk:

$$R = TVC$$

(where “R”= Risk; “T” = Threat; “V”= Vulnerability; “C”= Consequence)

This Analytic Hierarchy Process (AHP) provides the ability to rank alternative courses of action (COA), but is based completely on subjective criteria and subjective alternatives (Cummings, McGarvey, & Vinch, 2006, p. A–1). As Cummings et al. (2006) discussed, subjectivity is intrinsic to the nature of AHP risk analysis. The numerical analysis of the risk and course of action are based on the decision maker’s objective and comparison of COA are done via a pairwise matrix, and then weighted (Cummings et al., pp. A2–A4) to give a ranked value of the attractiveness (or preference) of one COA as compared to the others. researchers caution that simplistic representations of risk, such as AHP, are flawed when an inability to address probability or any potential lack of consistency exists among preferences or if the application of the AHP theory is compromised (Cummings et al., p. A4).

Mueller and Stewart (2011) reported on the flaw inherent to simplistic modeling as used by DHS (what they refer to as “probability neglect”) asserting that the reasonable context of the terrorist threat is that a very low likelihood of any individual being the victim of an attack exists. They cited sites five stratagems used by DHS to justify this neglect (Mueller & Stewart, 2011):

1. Focusing on worst-case scenarios—DHS can use emotion to justify almost any costs. Quoting Bruce Schneier, Mueller and Stewart (2011) derided the concentration on the low-likelihood/high consequence event upon which so much in HLS is based because such concepts “substitutes imagination for thinking, speculation for risk analysis, and fear for reason. It fosters powerlessness and vulnerability and magnifies social paralysis. And it makes us more vulnerable to the effects of terrorism” (Schneier, 2010).
2. DHS uses a rating scale in which the probability of an attack on a potential target is added to the losses. Thus, a target’s vulnerability and consequence ratings are added to the likelihood. With this model, a target with a high consequence and zero likelihood rates more protection than a target with low consequence, but a 100% chance of being attacked.

Exacerbating this problem, DHS chose to *ignore vulnerability altogether* assigning “vulnerability” a value of one in all cases until 2011 (Manning, 2011).

3. Assessing relative risk rather than absolute risk. He quotes the National research Council (2010, 137) in which risks are ranked without absolute measurement. NY is more likely to be struck by a terrorist than is Columbus, OH, but it is also more at risk for a tsunami. However, this has nothing to do with the likelihood of a tsunami. Or terrorism.
4. Inflating the importance of targets—CI/KR: What infrastructure is actually critical to the overall operation of the nation?
5. Inflating terrorists’ capacity, which ties to the worst-case scenario.

In a 2007-RAND Center for Terrorism Risk Management Policy, Willis et al., reported that the most likely attack mode on an American city was a conventional bomb of 600 pounds (Willis, LaTourrette, Kelly, Hickey, & Neill, 2007, p. 11). The study rates urban areas on their *relative* likelihood of terrorist attack. It ignores the probability of such an attack and does not compare damage/lives lost from terrorism to the damage/lives lost due to other causes of disaster.

### **3. Enterprise Risk Management**

Wittman (2011) has instructed that enterprise risk management (ERM) can be defined as “a holistic approach to identifying, defining, quantifying, and treating all of the risks facing an organization, whether insurable or not. Unlike traditional risk management, enterprise risk management deals with all types of risk, such as hazard or event risk, operational risk, credit risk, and financial risk” (A. Wittman, personal communication, February 15, 2011).

The Casualty Actuarial Society Enterprise Risk Management Committee (2003) has adopted the following definition of ERM in May 2003:

ERM is the discipline by which an organization in any industry assesses, controls, exploits, finances, and monitors risk from all sources for the purpose of increasing the organization’s short- and long-term value to its stakeholders.

For its purposes, DHS defines risk as the “probability that a particular attempted attack will succeed against a particular target or class of targets. It is usually measured against some set of standards, such as availability/predictability, accessibility, countermeasures in place, and target hardness” (GAO, 2006. p. 2). In the federal parlance, threat is defined as the probability that a specific type of attack will be *initiated* against a particular target or class of targets;” consequence is defined “as the expected worst case or worst reasonable adverse *impact* of a successful [terrorist] attack” (GAO, 2006). This bias towards terrorism as key to the identification of risk can lead to a false understanding of the needs of the nation as a whole. Therefore, an understanding of “enterprise” is illuminating.

#### **4. Remembering Vulnerability**

Rose (2009) noted that studies of risk in human systems do not do justice to vulnerability or factor the impact of community resilience. Instead, they tend to neglect issues, such as the response of individuals and organizations, and the cascade of system failures (e.g., failure of an electrical substation may lead to essential service interruptions and a much wider spread power failure on a regional or grid level). This aspect of vulnerability and consequence measurement is critical to the understanding of risk to complex human systems. Neglecting the complex inputs to risk, such as human responses to threats, has resulted in a simplistic and inflexible formula. The very equation upon which DHS bases its risk metrics is flawed. It is too static and neglects too many factors.

Measuring risk for a national economy that can be affected by physical damages, fear, and other seemingly disparate effects, requires a greater level of vulnerability analysis. Cardona (2003, p. 37) defined vulnerability as the “intrinsic predisposition” of a thing or system to be affected by, or to be susceptible to, a threat to which it is exposed. United Nations Ecologist Gilberto Gallopin (2007), however, stressed that this classical measure of vulnerability ignores exposure (“the degree, duration, and/or extension in which the system is in contact with, or subject to the perturbation”). This statement changes the appreciation of the true impact of vulnerability in light of the fact that nations (or communities) are extremely complex systems (Gallopin, 2007). A more descriptive

appreciation of vulnerability ties it to both probability and exposure and can be understood as the susceptibility of a system to suffer perturbation, such as long-term negative impact or profound permanent change from the occurrence of a threat (Gallopín, 2007). This view of vulnerability understands that a complex system can continue uninterrupted, despite the intrinsic existence of vulnerabilities, as long as the system is not *exposed* to the threat agent for a critical amount of time.

Data process security expert Shon Harris argued that most risk management is actually vulnerability management (Harris, 2010). He concluded rightly that society is faced with an almost infinite number of vulnerabilities but finite resources with which to address them (Harris, 2010). In addition, the level of a community's capability to be resilient must also be factored into the equation as it has direct impact on both vulnerability and consequence (Harris, 2010).

Clearly, calculations of vulnerability need to include an assessment of likelihood (probability) and duration of the threat (exposure). With a finite amount of resources, can society put as many resources into an area that is less likely to be struck, or address threats that are unlikely to materialize?<sup>3</sup> Moreover, if an area were judged to have a high probability of a catastrophic (Black Swan),<sup>4</sup> that community's ability to self-respond would be impacted as well. If so, the community would depend on the capacity of the less likely target areas to respond to deal with the occurrence. Carrying the argument to the limits of logic, it might be argued that DHS money should not be invested as heavily in an obvious target such as Los Angeles because its response assets are obviously likely to be impacted by the attack. Instead, perhaps more money and assets should be put into

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<sup>3</sup> This is a significant question. Is it in society's best interest to provide a widespread minimal level of capability to enhance resilience for all, or is it better policy to consolidate most (or all) funding into building capacity in particular areas of high vulnerability? A look at any Homeland Security grant funding reveals that the funding is currently allotted by both assessed risk and population-based formulae. A baseline amount goes to all areas, while larger additional amounts of funding are allotted to those areas assessed at greater risk.

<sup>4</sup> "Black Swan" events are those that are so rare as to be unthinkable, except for the fact that it is known they can occur. For this paper, such events are catastrophic events. Interestingly, definitions for "catastrophic disaster" are hard to find. In the 2008 DHS Office of the Inspector General (OIG) report, "FEMA's Preparedness for the Next Catastrophic Disaster (2008)" the authors use the term catastrophic more than 60 times, without offering a definition. In general, a catastrophic disaster is one in which the local and state authorities are overwhelmed so immediately that they are not able to cope with the situation without substantial federal assistance. Thus, not all hurricanes are "catastrophic" in nature.

McArthur, CA (population 365). Since it is so much smaller and less obvious a target, enough assets put into that area would reduce vulnerability by reducing the exposure of the response assets to threat—while building capacity to come to the aid of the “big city” in time of need.

Using data processing systems as a basis, Harris has shown that determining where the effort (or resources) for managing risk should be directed is the key to threat modeling (Harris, 2010). Threat modeling, Harris asserted, must be an iterative process that changes as new intelligence is gained—a risk management profile based on the vulnerabilities and consequences is created and identifies how the COA chosen in that profile affects the outcome with respect to whichever assets are being sought to protect, and then changes the parameters (Harris, 2010).

As noted, the DHS view of risk is based on simplistic (if common) risk calculations where  $\text{Risk} = (\text{threat} \times \text{vulnerability}) \times \text{consequence}$  (GAO, 2006, note 6, p. 2). However, after many attempts to measure progress in the battle to reduce risk (and after spending billions of dollars), GAO reported that DHS was sticking with that simple view (GAO, 2008). Kallman has noted that in fact such a framework does not define anything actionable, and is rather a system by which DHS evaluates threats using a particular definition of risk that ignores the wider spectrum of threats (J. D. Kallman, personal communication, August 5, 2010).

The information collected for the current research shows that the method and formula used by DHS is incapable of providing an accurate assessment of risk due to the failure of the formula to account for the multiple variables and interdependencies involved in a complex system, such as a society or an economy. A different model is needed.

Such a model has been constructed. Rose (2009) uses input from various immediate and ripple effects and other systemic impacts inherent to a complex adaptive system, such as a community. These “sub-models” provide detail regarding the true measure of risk. Taken as a whole, they provide a more comprehensive measure of risk to the affected community. Each input for these models is the result of analysis of subject

matter experts examining the individual systems, as well as experts studying the community as a whole and is currently in use on various projects (Rose, 2009, p. 17).

Using a *formula* is not the same as performing *modeling*—but it is easier.

Risk management is a sound practice, which is used in specific ways by many industries. However, the currently used formula is insufficient for modeling complex human systems in homeland security. A more thorough literature review will likely identify other viable formulas that can be used to perform modeling. This paper does not purpose to select the Rose model specifically. However, DHS needs to identify a more effective model than what it currently uses.

As a nation, the United States has identified that a sound risk management process is invaluable in developing homeland security policy. A problem is that the United States must also accept that the assessment and measurement of risk, as a part of homeland security, is based on multiple moving targets. These targets comprise a highly interdependent and complex system in which policies are enacted based on the needs of the threat and different aspects of the overall situation (Gallopín, 2007).

## **5. Consequences Have Consequences**

Alesch, Arendt, and Holly (2009) identified some concepts about consequences and risk management. They stated that the consequences of an event to a complex society based on multiple vulnerabilities were not quite as easy to measure as desired for inclusion in a heat map. They identified that for every disaster, the consequences that must be addressed include the following.

- Immediate (damage, deaths, etc.)
- Immediately following (civil unrest, pollution, housing)
- Systemic/Community (business failures, service needs)
- Ripple effects (people elsewhere are afraid, interruptions in transport, impact to businesses or communities elsewhere, etc.)
- Ripple reverberations (e.g., hardware stores might thrive to serve reconstruction needs, then fail a year later when no one needs plumbing supplies because it is all new, changes in political leadership resulting from opinion).

Rose (2009) suggests a model for estimating impacts of disaster including terrorist attacks that look at micro- and macro-economics, as well as cascading effects, intangibles, such as fear, and impact reductions from in-place mitigation, and community resilience.

Hazard loss estimation was for many years dominated by engineers, and hence, an emphasis was placed on (tangible) property damage, as opposed to the operation of businesses or the well being of households. The tendency was to refer to property damage as “direct” impacts and everything else as indirect. This limited perspective is being overcome by more accurate terminology as in the distinction noted above between direct (stock) property damage effects and direct flow (business interruption) effects. As soon as a factory is destroyed, its inability to produce must also be considered (Rose, 2009, p. 3).

Better risk management might be achieved by assessing the comprehensive impacts to stock and flow to the community. In so doing, multiple subject matter experts would be able to identify vulnerability and consequence, and identify in-place hazard mitigation efforts. This process could be used to identify strategies that might reduce overall vulnerability, enabling local authorities to recommend COA. Multiple COA will, in turn, allow communities to plan for, choose, and document opportunities to decrease the impact of a successful attack (or other disaster) and even decrease the probability of attack by demonstrating that the “target” community has been “hardened.” Local, regional, state, and federal leadership could then examine the COA and its own financial capacity to enact the course of action. Next, the locality could seek grant funds as needed and complete projects that would have a high likelihood of truly reducing losses.

In his October 27, 2009 testimony before the House Committee on Homeland Security, Subcommittee on Emergency Communications, Preparedness, and Response, FEMA Deputy Administrator for National Preparedness Timothy Manning stated, “intuitively, we could answer the question ‘Are we better prepared?’ with a ‘yes’” (Manning, 2010). This thesis agrees with this assessment, and also (to an extent) with Belevita (2010) when he concludes that “maybe risk as [a] symbol is sufficient.” While it might be enough to “intuitively” know that progress is being made and risk addressed,



billions of dollars of tax payer money have been spent and it is of critical importance to know objectively that the national return on investment is worth the outlay of public funds. Further, if the constitutional proscription is accepted that a preeminent role of government is to preserve and protect the nation, it is critical that limited resources be directed so as to provide the best effort to meet that goal.

Assessing risk as only a symbol of progress is sufficient in homeland security *if* the alternative is to force a simplistic numeric measure on such progress. On the other hand, complex risk measures can be assessed and used as a tool for making progress by examining a detailed understanding of the use and avoiding reliance on models developed for other purposes. Waugh stated, “disaster response mechanisms, by and large, are inadequate for most potential hazards due to difficulties in identifying hazards, defining risks, and communicating that information to policymakers and the public in a clear and compelling manner” (Waugh, 1998, p. 111). Were the nation to instead identify risk in real terms and then choose a COA that addresses each of these—either systematically or one at a time—and to which a clear dollar amount can be assigned, it could then be possible to take demonstrable steps toward better risk management.

As mentioned above, *one* of the consequences of having had a terrorist event as the foundational event of the HLS enterprise has been a tendency to overconcentrate on law enforcement activities. Less obvious, and yet perhaps more critically, an additional consequence was the crisis mentality in which legislation and government reorganization has occurred to support the HLS enterprise.

In terms of risk with huge consequences, bordering on national survival, it is critical to base decisions on fact, not “gut reaction.” Prospect Theory, developed by Amos Tversky and Daniel Kahneman (Tversky & Kahneman, 1974), explained that in viewing risk, it is essential to realize that the world swings between crisis and calm over and again, and then regresses toward an average steady state (Bernstein, 1998, pp. 270–273). Tversky and Kahneman dramatically showed that human beings make their decisions based on mental shortcuts called heuristics, which demonstrate that people neglect the actual probability of a threat and use the availability of threat images to judge the likelihood of a threat (availability heuristic) (Tversky & Kahneman, 1974). They also

showed that the ease with which it is possible to imagine an event (events that evoke emotion, such as a video of the Twin Towers) portrays the event as more risky (Tversky & Kahneman, 1974, pp. 1127–1128).

Further, “feelings” about an issue also become information upon which people base their opinions. If something makes a person feel good, then that individual is more likely to go with that feeling despite scientific risk. (Tversky & Kahneman, 1974, pp. 1129–1130.

In essence then, the novelty of an event, or the “dread” evoked appear more risky to those who perceive that event, which is a critical concept for U.S. leaders.

People are largely unable to understand fully the crises with which they are confronted, and instead revert to cognitive shortcuts—basing decision on their perceptions and on their understanding of their personal experience, rather than on the universe of fact (Bernstein, 1998, p. 271). In essence, prospect theory proves the adage that officials are always planning for the last disaster. Tversky and Kahneman documented that judgment of probability (as opposed to objective measure of risk) is based on certain critical factors, which include (Tversky & Kahneman, 1974):

- Insensitivity to predictability—it is the tendency of humans to base risk perception on what they “feel” are representative personal experiences—perception as reality
- Insensitivity to prior probability of outcomes—base rate frequency of occurrence *should* be a major consideration, but humans tend to disregard. In their experiments, Tversky and Kahneman found that people would use prior probability as the appropriate basis for decisions “when they had no other information” and ignored prior probability once subjective information was introduced (Tversky & Kahneman, 1974, p. 1125).
- Illusion of validity—The “unwarranted confidence which is produced by a good fit between the predicted outcome and the information” upon which they base their prediction. People will place confidence in their findings by selecting outcomes that agree with their representative experience and biases, without regard for any contradictory factors, even if they limit accuracy of the prediction (Tversky & Kahneman, 1974, p. 1125).

- Failure to comprehend regression—There are always “black swans” and these must be dealt with, but ignoring the probable is not a means of dealing with the possible. The failure to recognize regression leads to overemphasis on a few things, while omitting care of the probable—thus increasing risk dramatically.
- Bias introduced by retrievability of instances—People can physically experience some things (through personal experience, media exposure, etc.). These experiences will inevitably lead to bias toward those things they “know” and an expectation that those known things are the most imperative.

Particularly due to the failure to define the terms clearly, the Executive Branch has encroached further into the realm of powers reserved to the states by the Constitution, and has failed to develop objective measures or progress. As the research shows, the expansion of federal prerogative in times of crisis has been the norm. In times of great crisis, the doctrine of preemption has accelerated. However, this political tendency towards expansions of constitutional prerogative may not be demonstrably effective mechanisms for enhancing the preparedness of the United States to cope with the threats the nation faces. As the crisis resulting from the attacks of 9/11 has resulted in the expansion of the executive power greater than any since World War II, a comparison of preemption then and now is important.

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## IV. METAPOLICY AND PREEMPTION

[W]e were going to do the right thing, even if short-term it was unpopular. And I think anybody who's occupied this office has to remember that success is determined by an intersection in policy and politics and that you can't be neglecting of marketing and P.R. and public opinion.—President Barack Obama Barack Obama. (Baker, 2010)

The United States has invested billions of dollars and thousands of lives in the effort to create a nation that is more resilient—more able to cope with the results of the threats that face it than in the past. Nevertheless, the question must be asked of “what progress has really been made?” The answer is difficult to define. As the previous chapter examined, the lack of a definition for the effort is one key to that quandary.

### A. METAPOLICY

Additional to the definitional issues though is the lack of policy focus. As a result of the national failure to define the effort to date, the United States has acted by adopting a series of laws and policies—often changing, often controversial—so as to “do something.” President Dwight D. Eisenhower (1957) said, “plans are worthless, but planning is everything.” In essence, it is the information gathered for the plan and, more urgently, the *intent, process and conversations leading to the plan* that are critical—not the end document itself. This critical background is the *metaplan* (Campbell, 2000, p. 8). For example, Campbell (2000) in his examination of strategic planning paradigms in government, observed that the United States Air Force—an exceptionally innovative organization—plans incrementally, seeking short term gains. Such common strategic planning waits for failure before adapting. Metapanning, on the other hand, seeks the short-term while recognizing that even as the plan is executed, it will need to adapt to the unknowns that occur during that process, and build in this capacity (Campbell, 2000). Plans, of course, exist as the means to execute policies.

In this fashion, policy makers use disparate building blocks based on their own paradigms to develop the overarching policy itself. In the case of government, when developing policy to cope with crisis, the policy makers seek to develop concepts that will shape the future. This intent can be called *metapolicy*. Just as metadata provides important elements about the subset of data to which it is applied—that is, data about the data—and metaplans would reflect the policies and the thought process for designing the overarching plan and adapt to changing realities—metapolicy reflects the intent behind development policies.

Metapolicy is the overarching rationale that connects the concepts that lead to and connect the different actions taken to resolve issues and that look beyond current conditions to the function of the future (Risecker, 1998). In essence, the frame of reference joins different actionable processes and policies into the single overarching policy (Dorn, Henderson, & Marcus, 2005, p. 44). Policy development on the national scale, particularly in response to unforeseen crises, requires an understanding that government policy in general is formed in multiple contexts. Government policy results in a multiplicity of oversight and is invariably based on complex, often obscure goals and, designed based on the epistemology and worldview of the policy makers (Risecker, 1998, pp. ix, 1–3). Metapolicy allows for shifting context and goals, but is the framework applied to the issues by the policy maker—it inherently is subjective (Risecker, 1998) and thus can easily slip to become a manifesto for the policy maker if that person does not keep sight of an ultimate policy goal. As examination of American response to crisis in Chapters V and VI demonstrates the contexts brought to a crisis by individual presidents (and Congresses) can change goals, and thus, can reduce the effectiveness of a policy to meet a given crisis.

A review of the inconstant policy documents (See Table 6) from DHS and the White House (even neglecting the change in political parties following the 2008 elections) points to the United States lacking a consistent metapolicy on HLS. Chapter V demonstrates that the worldview of those in charge during a crisis can be detrimental to the rapid resolution of that crisis. Chapter VI examines the specifics of modern HLS policy.

The 2008 Department of Homeland Security Strategic Plan lists among its 2013 performance measures the achievement of limited outputs, such as apprehending 43.5% of individual air passengers who commit major violations of customs and immigration laws, 37.5% of persons in ground vehicles committing such major violations, and interdicting 71.5% of undocumented immigrants trying to enter the United States (United States Department of Homeland Security, 2008b, p. 8). These achievements are *outputs* not *outcomes*<sup>5</sup> and the import of these numbers to overall HLS should be questioned.

Without a definition for “homeland security,” it is impossible to define the full range of desired outcomes. In an effort to implement a metapolicy based on a non-existent definition, Congress passed a myriad of new laws and regulations and has defaulted to the time honored methods of crisis management—regulation, oversight, and preemption.

Tension between the Executive and Legislative branches of the government has existed since the inception of the Constitution. Further, the creation of laws, regulations, and the agencies to oversee them in response to crisis is the common process of the U.S. government. Those elected to government are popularly referred to as “lawmakers” as if that were the only reason for their function. The stated intent of these regulations and regulatory agencies is ostensibly to fix a specific problem. However, each new enactment is grounded in the sociopolitical viewpoints of the Congress or the President (or both). In essence, while the construction of a stable metapolicy is critical to coping with the complex system that is national policy on HLS, ideology and politics play a significant role in creating the metapolicy and can change with changes in political parties.

While experts may recognize that systems, such as HLS, are complex and interdependent constructs of various parts, these parts are conceived and analyzed individually under isolated and very specific conditions. Such methods of studying a complex system are too artificial. They fail to account for the reality that such systems are more than the sum of their parts and thus do not truly model the “conceptual

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<sup>5</sup> Outcomes are the result of individual activities or processes, an end state. They are narrow in scope and impact, and easily measurable. Outcomes are achievements and levels of performance—and not as easily quantified (they are more of a qualitative state). Outcomes *may* be associated with the outputs of processes, or those outputs may reflect nothing about the outcome (Seath).

reconstruction of the global system” (Northwestern Institute on Complex Systems, 2009, p. 3). To invest time and capital on enhancing the status of national direction, the policies enacted by government must be viewed not only individually, but as components in a goal as part of a more global desired outcome—the metapolicy.

## **B. PREEMPTION AS NATIONAL RESPONSE TO CRISIS**

### **1. Flawed Metapolicy Impact on Coping with Risk**

The insidious nature of metapolicy flaws goes back to the concept of prospect theory discussed in Chapter III. Tversky and Kahneman found that the biases influencing the development of critical risk-response policy are not based on intentional motivations or even on distorted judgments about “payoffs and penalties” or restricted to those who are not expert enough (Tversky & Kahneman, 1974, p. 1130). Rather, humans judge probability, and thus risk, to be rational only if the judgments are “compatible with the entire web of beliefs held by the individual” reaching the judgment (Tversky & Kahneman, 1974, p. 1130) and fulfilling the decision-maker’s biases.

Therefore, all people—and not the least elected leadership—pay inordinate attention to lower-probability dramatic events (such as terrorism) and overlook the criticality of events and actions that may be more important, and more likely to cause problems (Bernstein, 1998, p. 272). Thus, the tendency is for leaders to insinuate their overall socio-political goals into the process for crisis management—because these goals fit the “entire web” of their beliefs and influencing metapolicy development as Risecker predicted (Risecker, 1998).

### **2. Constitutional Issues**

The purpose of examining FDR’s response to the great economic crisis (Chapter V) and the Bush/Obama response to the modern HLS crisis (Chapter VI) is not to compare the crises themselves. Rather, the importance is in assessment of the response—



were the tactics appropriate to resolving the crises; were they constitutionally sound? The following table lists the formal constitutional powers granted to the Executive and Legislative branches of the federal government.

Table 1. Formal Constitutional Powers Granted to the Executive and Legislative Branches of the Federal Government. (From: Ulrich, 2004, p. 232)

<b>Formal Constitutional Powers of the President Relative to National Security Policymaking</b>	<b>Formal Constitutional Powers of Congress Relative to National Security Policymaking</b>
“The executive Power shall be vested in a President of the United States of America.” <sup>14</sup> Article II. Section 1. “ . . . he shall take Care that the Laws be faithfully executed . . .” Article II, Section 3.	“The Congress shall have Power to . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, all other Powers vested by this Constitution . . .” Article I, Section 8.
“ Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President . . . If he approve he shall sign it, but if not he shall return it . . . If after such reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent . . . to the other House . . . and if approved by two thirds of that House, it shall become Law.” Article I, Section 7.	“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the debts . . .” Article I, Section 8.” No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law..” Article I, Section 9.
“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Article II, Section 2.	“The Congress shall have Power to . . . provide for the common defense and general Welfare of the United States , . . . declare War, . . . to raise and support Armies . . . , To provide and maintain a Navy; To make rules for the Government and Regulation of the land and naval forces; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .” Article 1, Section 8.

Nietzsche famously commented “how does it happen that the state will do a host of things that the individual would never countenance?-Through division of responsibility, of command, and of execution” (Nietzsche, Kaufmann, & Hollingdale, 1968. pp. 382–383).

Nietzsche’s arguments regarding the individual vis-à-vis the government can be broadly extrapolated to the individual states vis-à-vis the national government. The national government can be more naive about some things regarding the needs of the states and the states’ residents than the government of the state itself. The national government will (and constitutionally must) do things the individual states might never countenance (Ulrich, 2004) but must also respect the needs of the states. Thus, constitutional power over the regulation of interstate commerce (Art I, Sec 8, Clause 3) respects the states’ need for assurance that all states share equal benefit and have equal requirements. The full faith and credit clause (Art IV, Sec I) binds states to honor contracts, etc. issued in another state so that the rule of law is equivalent across the nation. However, the framers of the Constitution also reserved great power to the states. For example, the constitutional power to declare war is clearly a national power, and yet the Constitution allows states to act in their own defense.<sup>6</sup>

Ulrich (2004) identified three significant political contexts that have characterized national security relations between the President and Congress. First, the power of the executive branch is greatest when the President acts pursuant to congressional authorization or intent. The national security policy decisions of the President at times such as these is nearly unchallenged and tends to coincide with periods of national crisis. However, such periods of convergence are inevitably followed by a reassertion by Congress of their prerogatives.

The second context is found in the times in which Congress mutely acquiesces to the executives decisions in a given policy area. At such times, the process is driven not so much by presidential leadership, as by congressional distraction. It might be argued

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<sup>6</sup> No State shall, without the Consent of Congress...engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay (Art I; Sec 10).

(although Ulrich does not) that such distraction occurs only in time of crisis, for instance, pressing domestic issues might distract Congress from issues of foreign affairs (Ulrich, 2004).

The third national security policy context is found in times when the executive and legislative branches' desires are in direct conflict. The prime example of this in modern times was the change in opinion regarding the Vietnam War. At first, Congress wholeheartedly backed the executive branch following the Gulf of Tonkin incident. However, the conflicting priorities of Congress and President Nixon eventually resulted in the War Powers Act as Congress sought to reassert its control (Ulrich, 2004).

In the 1970s, significant congressional reforms provided the legislative branch with a greater ability to exert power including enhanced challenges of presidential policies. Zoellick argued that the creation of the Congressional Budget Office (CBO), the CRS and expanded congressional staff at the committee and member level has enabled Congress to exert more oversight over policy and a trend towards micromanaging policy by legislating specific aspects and carving out specific budget items (Zoellick, 2000, pp. 26–27). Such changes also enabled Congress to preempt state power through additional regulation, oversight, and budgetary controls (Zoellick, 2000).

When crisis strikes, political leadership works to address and correct the causes of crisis. The foundation of American government has provided stability and survivability through these crisis times—not always smoothly and often with continued repetition of mistakes and miscues. Kuhn (1996) observed that crisis is not itself recognized until the problems of which it consists have existed for some period of time and more and more people have turned their attention to it and attempted unsuccessfully to resolve it within their existing paradigm.

In national crises that threaten the very existence of the state, Americans turn to their elected and appointed leadership for solutions. These men and women look to their own paradigm—the history of political leadership and change for applicable solutions. However, leaders immersed in the “old way” of examining issues are unlikely to admit the need to try a different path (Kuhn, 1996). Thus, the stability of the American

government through the past 200 years works against change—what seems to have worked before must work again because the nation has survived. If the activity of the past worked despite detriment to the composition of the nation, this stability is achieved without changing the paradigm (Kuhn, 1996). In such cases, the crisis is merely *averted*, not resolved, and change itself is accepted as solution. The response to crisis in American history has been for Congress to pass laws and regulations wherein a new executive agency preempts traditional legislative branch function (see Chapters V and VI). In a rush to find *some* solution to the crisis, the Constitution is reinterpreted to allow a new agency to be the solution. A driver behind the perceived need to make permanent, fundamental changes is rooted in the premise of such changes that crises are otherwise permanent (Schlaes, 2007).

This belief is particularly true in two of America's greatest crises: the Great Depression (as addressed by the New Deal leading up to the World War II) and the Homeland Security crisis today. The two periods (1929–1941 and 2001–2011 and beyond) have certain significant similarities. For example, each of these crises overlapped a significant natural catastrophe. The New Deal spanned the great drought commonly called the “Dust Bowl” of 1931–1938; Hurricane Katrina greatly impacted the HLS crisis in 2005. Both crises influenced and were influenced by war as well. These historical coincidences are important. In each case, the national attention was split between the intangible overarching crisis and the tangible impact of natural calamity. Response to these natural disasters was rolled into the metapolicy crafted to meet the original crisis. That the federal government could not predict or prevent either the dust bowl or hurricanes, federal action was perceived as necessary (Schlaes, 2007). The Civilian Conservation Corps and the Soil Erosion Service were the first direct action of the federal government to regulate private land use of privately owned lands (Woolner & Henderson). The Post Katrina Emergency Management Reform Act (PKEMRA) resulted in massive changes to the nation's disaster response and recovery system in the midst of wrestling with the impact of terrorism on this system.

## **V. INVESTIGATION—THE NEW DEAL AS RESPONSE TO CRISIS**

American popular opinion often assumes that the Great Depression began with the crash of the New York stock exchange on Friday, October 29, 1929. This, of course, is a simplistic U.S. centric point of view and the reality is much more complex. In brief however, it can be safely asserted that the economic crisis occurred at a time leading up to and including a violent international political crisis, and was great enough to threaten the fabric of the nation, and involved a violent threat to the lives of its citizens from abroad. The crisis was met domestically with legislative answers—the result of which are still debated—and with war. From 1933 through 1941, the U.S. government reacted to the crisis of the Depression with a flurry of new regulations and laws, and executive agencies to execute them.

In his first inaugural address, President Franklin Delano Roosevelt (FDR) declared war on the crisis into which he stepped as the nation's leader.

[F]irst of all, let me assert my firm belief that the only thing we have to fear is fear itself....It is to be hoped that the normal balance of Executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure. I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of a stricken world may require....[I]n the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis - broad Executive power to wage a war against the emergency. (Roosevelt, 1933)

Creation of executive departments is one such “constitutional duty” of the President, and can be used to enact fiscal policy that attacks a crisis. Article II, Section 2. empowers the President to “appoint...public Ministers and Consuls,...and all other Officers of the United States....Congress may by Law vest the Appointment of such

inferior Officers, as they think proper, in the President alone.” If the executive determines that the course of action for achieving the strategic crisis management goals is best met by creating a department or agency, it is within his constitutional mandate to do so.

The purpose of this thesis is not to conclude the arguments between economic models or to answer conclusively the impact of intentional policies on ending the crisis. Rather, it is necessary to examine the metapolicy behind the actions taken by the Roosevelt administration. The New Deal *metapolicy* was one of social and economic reconstruction to solve the then-current crisis and mitigate against the chance of recurrence. The issue, then, was the use of social reconstruction to accrue political power typified by expanded executive preemption to derive a policy aimed at solving the economic crisis. These, it can be argued, are two separate goals—if complimentary ones in FDR’s mind. This social reconstruction required expanded executive powers and increased federal preemption.

One part of crisis-driven preemption is to convince the public that the new agency is not only needed, but some other group—“they”—are not capable of understanding the need. The executive becomes the paternal, Socratic teacher. Speaking on the Agricultural Adjustment Act (AAA), FDR referred to detractors as the “high and mighty people” who would not let the common man try and reach his level and who were not intelligent enough to agree with the New Deal policies (Roosevelt, 1935). The disparaging of the opposition is not a tactic reserved to any one party, however. The intent of comments such as these is clearly to marginalize antagonists and provide justification for why power needs to be concentrated.

Table 2. New Executive Agencies of the New Deal. (From: New Deal Alphabet Agencies)

Year	Act	Description
1933	Agricultural Adjustment Act (AAA)	Paid farmers for not planting crops to reduce surpluses, increase demand for seven major farm commodities, and raise prices. Farm income rose, but many tenants and sharecroppers were pushed into the ranks of the unemployed. In 1936, the Supreme Court voided the AAA (Roosevelt)

<b>Year</b>	<b>Act</b>	<b>Description</b>
1933	Civilian Conservation Corps (CCC)	Took unmarried men aged 18–25 from relief rolls and sent them into the woods and fields to plant trees, build parks, roads, and fight soil erosion on federal lands. Young men sent their \$30 a month home to their families and left a legacy of outdoor recreation areas (including the Blue Ridge Parkway). The CCC provided jobs for 2.5 million over 10 years
1933	Civil Works Administration (CWA)	Employed four million people—paid an average of \$15 a week—many in useful construction jobs, such as repairing schools, laying sewer pipes, building roads. Some CWA jobs, however, were criticized as useless (e.g., leaf raking). Roosevelt disbanded the program after less than a year.
1933	Glass-Steagall Banking Reform Act	To restore confidence in banks and encourage savings, the act created the Federal Deposit Insurance Corporation (FDIC) to insure bank customers against the loss of up to \$5,000 their deposits if their bank should fail. The FDIC is still in existence.
1933	Federal Emergency Relief Administration (FERA)	Supported nearly five million households each month and funded thousands of work projects for the unemployed. It also provided vaccinations and literacy classes for millions of poor people
1933	National Industrial Recovery Act	Created the National Recovery Administration (NRA) to promote economic recovery by ending wage and price deflation and restoring competition. The NRA set business codes and quotas. Under its symbol of a blue eagle and slogan (“We Do Our Part”), the NRA temporarily restored investor confidence and consumer morale, but it failed to stimulate industrial production. Also created the Public Works Administration (PWA) intended both for industrial recovery and unemployment relief. Eventually, over \$4 billion was spent on 34,000 construction projects including public buildings, highways, bridges (e.g., San Francisco’s Golden Gate Bridge), and dams for water and power. In 1935, the Supreme Court declared the NIRA unconstitutional.

<b>Year</b>	<b>Act</b>	<b>Description</b>
1933	Tennessee Valley Authority (TVA)	A comprehensive federal agency created in 1933 for the economic development of the Tennessee River watershed. The TVA built 20 dams to control flooding, generate hydroelectrical power, increase agricultural production, and revitalize the Tennessee Valley region. The TVA also provided jobs, low-cost housing, reforestation and other services.
1934	Federal Housing Administration (FHA)	The FHA was created in 1934 to stimulate the building industry by providing small loans for home construction.
1934	Home Owner's Loan Corporation (HOLC)	A related program, also created in 1934, to the FHA to provide for home loans.
1934	Indian Reorganization Act	Called the "Indian New Deal," reversed the forced-assimilation policies in effect since the Dawes Act of 1887. The IRA tried to stop the loss of Indian lands and encouraged Native American tribes to establish local self-government and to preserve their native crafts and traditions.
1934	Securities and Exchange Commission (SEC)	Created in 1934 to serve as a federal "watchdog" administrative agency to protect public and private investors from stock market fraud, deception and insider manipulation on Wall Street. The SEC is still in existence
1935	Wagner Act (National Labor Relations Act—NLRA)	Created the National Labor Relations Board to protect the rights of organized labor to organize and collectively bargain with employers.
1935	Emergency Relief Act	Created the National Youth Administration (NYA) to provide more than 4.5 million jobs for youth
1935	Rural Electrification Administration (REA)	Before the New Deal, only 10 percent of the country outside cities and towns had electricity. The REA (1935) gave low-cost loans to farm cooperatives to bring power into their communities. By 1941, the REA succeeded in raising to 40 percent the number of farms with electricity.



<b>Year</b>	<b>Act</b>	<b>Description</b>
1935	Social Security Act	Established the Social Security Administration (SSA) to administer a national pension fund for retired persons, an unemployment insurance system, and public assistance programs for dependent mothers, children, and the physically disabled. The pension was financed by a payroll tax to begin in 1937. It exists to this day as the nation's most important and expensive domestic program, covering over 40 million Americans and accounting for about one-fourth of the federal budget.
1935	Emergency Relief Appropriation Act	Established the Works Progress Administration (WPA), which lasted until 1943 and employed at least 8.5 million people at an average of \$2 a day. They built thousands of roads, bridges, schools, post offices and other public construction projects. In addition, under the WPA's Arts Program, thousands of unemployed writers, musicians, artists, actors, and photographers temporarily went on the federal payroll, producing public projects ranging from murals to national park guidebooks.
1937	Farm Security Administration (FSA)	Formerly called the Resettlement Administration in 1935 to aid sharecroppers. The FSA set up temporary housing for "Okies" and "Arkies" (Dust Bowl refugees from Oklahoma and Arkansas) who migrated to California in hope of finding work.
1938	Fair Labor Standards Act	The last major piece of New Deal legislation (1938), this important labor law set minimum wage (25 cents an hour) and maximum hour standards (establishing the 40-hour work week). It also severely curbed the use of child labor.

By taking a broad look at the goals of the U.S. government for dealing with the crisis of the Depression, the following might be identified: restoration of the economic strength of the nation, providing immediate relief for the many displaced persons, and above all, preserving the American way of life. FDR specifically put forth two key "lines of attack:" putting people to work (his primary task) and reorganization of the use of natural resources. Behind that, FDR alluded to his metapolicy in his first inaugural address (Roosevelt, 1933). He sought redistribution of people and wealth; new federal control over formally private sector responsibilities; and a redesign of the American economic structure (Roosevelt, 1933).

Former White House Chief of Staff Rahm Emanuel summarized the political response to a crisis “you never want a serious crisis to go to waste. What I mean by that is it is an opportunity to do things you think you could not do before” (Video—Rahm Emanuel on the Opportunities of Crisis—WSJ.com). New Deal crisis response was no different. “The country was in no mood...to put Roosevelt’s concepts under a microscope. What mattered was change: like an invalid, the country took pleasure in the very thought of motion. Roosevelt invoked wartime powers, and to the people it seemed that he...needed those powers” (Schlaes, 2007, p. 15).

If crises persist or build, such tactics are exceptionally effective. Six months prior to Pearl Harbor, the usually conservative *Fortune* magazine published an editorial entitled “Prelude to Total War,” (July 1941, p. 35).

Our first act must be to give up the very basis of our civilization. Our prices must be controlled, our economic incentives must be taxed, our materials must be subjected to priorities, our property and our scientific inventions must be put at the disposal of the state. We surrender these liberties temporarily, but surrender them we must. (quoted in Gordon & Krenn, 2010).

New Deal policy seized powers previously considered state level responsibilities to address the twin crises of the Great Depression and the impending world war. The long list of so-called Alphabet Agencies established under the New Deal to administer and regulate the policies implemented illustrate this expansion of the role of the national government over that of the several states (Table 3).

Table 3. The Alphabet Agencies

Civilian Conservation Corps	Created parks and recreational areas
Federal Emergency Relief Administration	Direct payments to households
Federal Housing Administration	Administered regulations and loan systems to high risk individuals
Home Owner's Loan Corporation	Provided local home loans
Securities and Exchange Commission	Federal watchdog over private investment
National Labor Relations Board	Involved the federal government in private wage disputes
Works Progress Administration	In addition to construction, provided funds to artists

In essence, by the end of the Great Depression, the federal government had preempted the state governments as the major provider of aid to individuals. The creation of these agencies (many of which persist today) forever altered the role of the federal government in the affairs of the individual citizen, and further enhanced federal primacy in government. In dealing with the immediate crisis of the depression, federal power was consolidated as whole classes of people became dependant upon federal largesse (Schlaes, 2007). Once gained, these new federal powers have not been relinquished.

Tinkering with the national and even world economy with short-term change as the goal befits the Keynesian model favored by the Roosevelt administration. Keynes was against long-term planning because it is not possible to predict outcomes with certainty or be in firm control of the result. "We can never know enough to make the chance worth taking" (Keynes, 2007), he wrote. Long range strategic planning for the economic crisis was not, it can be argued, the effective course of FDR's economic policy. Rather, rapid short-term fixes (such as price stabilization) would be the Roosevelt administration's first recourse. FDR, embracing Keynesian theory, sought to assert control over the short-term economic symptoms to stabilize them rapidly, spending out of the crisis and adjusting as needed. At one point, FDR personally set the price of gold for the world from his bed at 21 cents. His reasoning was simply that 21 was lucky because it was three times seven (Schlaes, 2007, p. 148).

To accomplish economic control, FDR capitalized on the war mentality he expounded during his inauguration to create government regulatory entities to implement new economic policies. In essence, though, the metapolicy of economic and political restructuring resulted in multiple plans of differing effectiveness. These plans would restructure the nature of America making it, he hoped, stronger and more “just.” Romer argued that FDR’s policies were far more geared to permanently enhance federal control than to deal with the real economic crisis. The FDR administration consciously made decisions, such as funding the new Social Security national pension system a primary goal, and chose actions based more on the hope that they would prove effective but that shifted based on underlying social metapolicy (Romer, 1992, p. 765).

Just as the Great Depression did not begin with the 1929 crash, America did not begin World War II with the December 7 attack by Japan. Gordon and Krenn (2010) documented that America’s *economy* had actually “entered” into the war by June 1940—18 months before Pearl Harbor. They concluded that fiscal policy was the leading cause of recovery from the Great Depression in the year leading up to actual fighting, but conceded that the eventual recovery was driven by a bifurcated approach that also involved monetary policy.

Other than World War II and the Korean War, no federal fiscal stimulus has been large enough to extrapolate upon to prove or disprove efficacy (Gordon & Krenn, 2010, p. 34). The massive spending on the build-up to World War II in the years 1939–41, including the building of weapons, shipping, construction of military facilities in the United States, were coupled with significant capacity constraints (shortage of materials and a shift in workforce due to massive enlistment into the armed forces). At the same time, the world economy was also involved in run-up to World War II (and actual fighting of other wars prior to 1936). Significant argument exists over whether or not it can be proven that the massive social change-based fiscal policy of the New Deal was the driver of America’s economic recovery. Reynolds (2001) argued to the contrary that such fiscal policies are “a poorly defined instrument” that cannot be counted upon to achieve any permanent progress (Reynolds, 2001, p. 266).

At the same time that federal expenditures were increasing on war preparation, federal revenue from taxes also increased. In part, this was due to perceived stimulus of the economy but, to a greater extent, was due to concomitant increases in the corporate, excise, and personal tax rates (Vernon, 1994, pp. 859–862). Most of the research agrees that the Great Depression ended by the end of 1942 (see Vernon, 1994) but no clear consensus exists as to whether it was New Deal fiscal or monetary policy or the onset of World War II that created the solution.

Kirkwood argued that government-spending policy did not contribute enough to recovery, and that monetary policy in general, was insufficient to the task of stabilizing the economy (Kirkwood, 1972, p. 834). Romer (1992), on the other hand, categorically asserted that the Great Depression ended strictly due to conventional monetary policies. In hindsight, it is apparent that the tide of history rather than political restructuring most likely resulted in the recovery—and might well have done so despite the New Deal policies' success or failure. Before the outbreak of hostilities in December 1941 between the United States and Germany, the U.S. economy had transformed to support the buildup to war (Gordon & Krenn, 2010). Shortages of raw materials created by the need to arm the nation placed unnatural constraints on the economy and fiscal policy (government spent to build things for the government, and paid workers who, despite their income, could not buy products because the raw materials were used for the government purpose).

The various experiments of the Roosevelt administration—some long lasting, some determined to be unconstitutional, and some simply discarded—provided no certainty to crisis solution plans or policy. What is clear is that the New Deal resulted in significant reinterpretations of the constitutional interaction between the federal and state governments, and new interpretations of the constitutional role of the federal government in the day-to-day business and lives of citizens.

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## **VI. INVESTIGATION—HLS RESPONSE TO CRISIS**

The Federal Government can and will provide the necessary coordination and guidance for the civil defense program. ...It is the expressed policy and intent of Congress, however, that the responsibility for civil defense should be vested primarily in the States and their political subdivisions. - President Harry S. Truman. (Woolley & Peters, 1951)

### **A. CRISIS?**

Is there a HLS crisis in the United States? This is a critical question going forward, and the answer depends in large part on an individual's understanding of the word "crisis." As Cook and Cook (1976) assessed, crisis is not a simple word to define, and applying the term "crisis" to a problem is a rhetorical means of focusing attention on that problem. They wisely cautioned that, while such focus is usually intended to marshal action to solve the problem, it is imperative that policy makers not become so mired in rhetoric that they fail to analyze the nature of the problem itself in terms of real data (Cook & Cook, 1976, p .632). At times, the problem indicated by the data may be markedly different from the problem encapsulated by the rhetoric (Cook & Cook, 1976, pp. 632–633). Starn has suggested that, in fact, the "convenient ambiguity" of the term is what has lead to so many situations being described as crises (Starn, 1971, p. 22).

In essence, several contexts should be assessed to decide if a problem indeed constitutes a crisis. The relative frequency of the problem's occurrence and/or any increase in rate of occurrence could be gauged (Cook & Cook, 1976). However, an unprecedented and unexpected event must be considered as well (Boin, 2004; Rosenthal, 2003). A critical context is the relative severity of the consequences of the problem being examined (Cook & Cook, 1976). The perception of fear of that problem engendered in those potentially exposed to the problem is also a required context (Cook & Cook, 1976, p. 635). Rosenthal summarized these in three contexts—severe threat, urgency, and uncertainty (Rosenthal, 2003, p. 130). Whichever context is used, application of the term

is an analytical concept that implies the linkages of events and actions, various disciplines, continuity and specific moments in time both past and future (Boin, 2004; Starn, 1971).

Moreover, Boin (2004) asserted that not only are crises defined by the fact that they are a threat to the continuity and ability of governments, but that the combination of crises (to include economic problems, disasters, etc.) and personal ambitions of leaders have resulted in governmental actions that do not address the problem at hand. As 't Hart, Heyse, and Boin noted, the world is now more risk based than in the past ('t Hart, Heyse, & Boin, 2001). As complexity has increased along with greater interdependence of nations, economies, technology, business, etc., the impact of emergencies has grown ('t Hart et al., 2001). The management and response to risk is significantly more politicized than in the past, requiring more and more effort, attention, and expense from both business and government ('t Hart et al., 2001).

The White House is accurate in asserting that the United States is confronted with a reality that moves beyond the traditional defense and security models (White House, 2010, p. 10). Working within the parameters of the HLS and the HLS enterprise as set forth in Chapter III,<sup>7</sup> and assessing the increasing impact of natural hazards and threat of technological and intentionally caused threats, the conclusion can be drawn that the problems addressed by the HLS enterprise are severe, urgent, unprecedented, and induce fear. By these contexts, America does face a homeland security crisis, but the nation's leadership would be well advised to remember that rhetorical focus on the problems is not the same as finding solutions.

## **B. PREEMPTION AS METAPOLICY**

A month after the 9/11 attacks, the *Washington Post* outlined the political confusion at the outset of HLS metapolicy when it opined that potential positive outcomes from “the national trauma include improved public health institutions, more

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<sup>7</sup> The governmentally directed activities within the borders of the nation that encompass the active and passive measures taken to protect the population, area, and infrastructure of the United States by preparing for, deterring, defending against, and mitigating the effects of threats, disasters, and attacks.



effective immigration procedures, and eventually, more efficient internal combustion engines,” defining the concept of states’ responsibility as “illusion” (Conaway, 2001, p. B.01). In practice, the decisions of Congress and the Supreme Court preempting state authorities have been almost capricious, lacking in consistency and based upon judicial reaction to whichever state responsibility was in question at the time (see *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), (Cornell Legal Information Institute, 2011a, p. 244).

Indeed, the Court has determined that the commerce clause of the Constitution gives to Congress powers similar to police powers (See *Brooks v. United States*). In *Fry v. United States* (1975), the Court determined that Congress’ ability to preempt states’ prerogatives are vast, finding that “activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations” (*Fry v. United States*).

As documented in Chapter IV, the Court relied on dual federalism as the primary doctrine until the New Deal. With the actions of the Roosevelt administration and the findings of the Court in cases related thereto, a different standard now applies. The Court now looks to the intent of Congress as the primary factor in approving preemptive legislation or executive actions (Cornell Legal Information Institute, 2011c). The Court has gone so far as to explicitly state that if Congress wishes to preempt, “[t]he relative importance to the State of its own law is not material...” (*Free v. Bland*, 663; *Free v. Bland*, 205). Thus, it is not surprising that Congress and the President have decided to act in what has—for the past 70 years—become the time-honored method of preemption for dealing with HLS issues. The problem, this thesis asserts, is that preempting a state’s power and responsibility for protection and resiliency does not address the HLS crisis itself.

### **1. Domestic Realism As Cause of Preemption**

Preemption seems to be the path of least resistance and a means to exercise more federal regulation and power. As discussed in Chapter II, HLS is an effort to make the nation resilient to disasters of *any* cause. That it is easy to pass a regulation and increase

federal control appears to be the core metapolicy for HLS decisions, and the basis for HLS failure to date. What was evident in the response to the Great Depression is that if a government chooses to inculcate wider social or political goals into the process of resolving the crisis, the crisis lingers.

Khoury (2007) developed an international relations theory he called “Domestic Realism.” He based his concept on the classical Cold War era understanding of realism vis-à-vis nation states, wherein political power of the state is more important than any other factor within that state (Goldstein & Pevehouse, 2006). Khoury proposed that when under threat, states (including their institutions and security apparatus) act to resolve that threat in a manner that invariably impacts negatively on civil liberties (Khoury, 2007, p. 17). ‘t Hart, et al. (2001) also found that governments, when faced with crisis, predictably tend toward a centralization of decision making and power. Krasner (1999) concurred that “rulers” act to alter the basic structures of their nation’s constitutional government by imposition of their personal goals. A high state of “power asymmetry” resulting from periods of stress provides the necessary conditions for changing the constitutional relationships of a nation-state (Krasner, 1999, pp. 152–153).

Extrapolating further, a form of domestic realism can be seen in American history wherein the federal government—acting to resolve crisis—impinges on the separation of powers. During the New Deal, FDR exhibited this concept when putting his perceived need to adjust the social order as part of the crisis “cure.”

In the months and years following the attacks of 9/11, the penchant for preemption has continued. Thus, in Khoury’s theoretical construct, the metapolicy of the U.S. government (without regard to party) is to fight the battle of federal vs. state power during times of crisis. As Walt concluded, those who make policy always rely on their personal world view, even if they do not state this directly, but it remains difficult to “make good policy if one’s basic organizing principles are flawed” (Walt, 1998).

At the federal level, the Secretary of Homeland Security, who leads the development of homeland security policy and goals, also leads the federal agency charged with executing those policies and goals. The 2010 Quadrennial Homeland

Security Review (QHSR) identified these goals as including the prevention of terrorism, management of risk, cyber security, border security, enforcement of immigration laws, and ensuring resilience to disasters (United States Department of Homeland Security, 2010a). The QHSR asserted that some roles (specifically border issues) are unique to the federal government, and thus, the Department of Homeland Security, while other areas place the department in a coordination role working with various subject matter experts (United States Department of Homeland Security, 2010a, pp. 12–13).

Clearly, defense and diplomacy—even as part of a counterterrorism effort—are constitutionally mandated to the Congress and, through that body, tasked to non-DHS agencies, such as the Departments of Justice, Defense, and State, etc. Interestingly, the QHSR relegates the critical roles of state, local, and tribal governments in the counterterrorism and disaster resiliency realm to passing mention, which emphasizes the assumed supremacy of the federal government over the states (United States Department of Homeland Security, 2010a, pp. 12–13).

## **2. States As Barriers**

In March 2010, the United States Department of Homeland Security Office of the Inspector General (OIG) concluded that FEMA’s difficulty in coordinating with subject matter experts located in separate programs was contributing to problems within the agency. “When subject matter experts...reside outside of FEMA, the agency’s ability to coordinate across...programs is impeded” (Department of Homeland Security Office of the Inspector General, 2010, pp. 11–12). As fodder for preemption, the OIG cited barriers at the state level as major problems as well (Department of Homeland Security Office of the Inspector General, 2010). Specifically, the OIG reported “there is not one organization within...[any] state that has visibility over all state entities that receive DHS financial assistance” across all programs with homeland security responsibilities (Department of Homeland Security Office of the Inspector General, 2010, p. 13).

HLS leaders are often the political appointees (Logan, 2009). With the regular change of elected leadership every few years federally and in each state, it is likely that many or all of these persons will be replaced on a regular basis (Logan, 2007). This

change is the normal process of government, but does not maximize America's ability to capitalize on professional experience and expertise and poses risks due to succession issues. In some cases, HLS leaders may choose to leave government posts prior to the end of the elected official's term to ensure future employment. Years of experience in dealing with HLS issues can be lost in the transition. In the meantime, disparate organizations work in the best of faith to establish a functioning homeland security apparatus (Logan, 2009).

Taking steps ostensibly designed to resolve the HLS crisis, the federal government's attention concentrates on a single cause of crisis (terrorism) and yet the metapolicy, as will be shown, concentrates on opportunities to preempt the states' roles through new laws and mandates, and the introduction of billions of dollars. In creating the new laws and mandates, and in issuing the funds, the federal government responded to the proximate cause of the crisis—the 9/11 terrorist attacks. However, as noted earlier in this thesis, the HLS crisis is not synonymous with the threat of terrorism. Using laws and money to address only this (albeit critical) single issue did not in the end address the HLS crisis (Morton, 2008, p. 6).

## **C. LAWS, MANDATES, AND MONEY**

### **1. Constitutional Provisions on National Security**

In *New York Times v. United States* (1971), Justice Black writing for the majority said, “the word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment” (Black, 1971). Yet, in the name of homeland security, several laws have been promulgated that have generated significant controversy and concerns over civil rights implications. It can be argued that the method of coping with the HLS crisis is derived from a flawed metapolicy due to the lack of a firm definition of homeland security, as discussed in Chapter II. The concept of HLS law since 9/11 derived from this flawed

metapolicy is conceived primarily in response to proximate causes of current headline crises (Homeland Security Council, 2007), and—as was the case with New Deal response to the Great Depression—is not fully capable of resolving the crisis.

## **2. Powers of Congress**

Article I, Section 8 of the Constitution gives to Congress the power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years . . . To make rules for the government and regulation of the land and naval forces; To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; [and] To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States . . . (United States Constitution).

In Article II, Section 2, the Constitution provides to the President the position of Commander-in-Chief of the armed forces and gives the President the power to make treaties with the advice and consent of the Senate.

Article IV, Section 4, guarantees to the states that the federal government will protect them from invasion and domestic violence. Importantly, writing for the majority, Supreme Court Chief Justice Taney ruled in *Luther v. Borden* that other than in Congressionally declared war, all other conditions of violence are regarded by the Constitution as but ordinary cases of private outrage, to be punished by prosecutions in the courts or as insurrections, rebellions, or domestic violence, to be put down by the civil authorities, aided by the militia, or, when these prove incompetent, by the general government (*Luther v. Borden*).

## **3. Civil Defense and Homeland Security**

The preamble of the Constitution places “the common defence” (*sic*) and “domestic tranquility” as two of the overarching responsibilities of the federal government. Less than three decades after the signing of the Constitution, the states began to cede power to the central government when disaster struck. The so-called

Congressional Act of 1803 was the first time the federal government formally provided disaster relief; in this case to a New Hampshire town following an extensive fire. During the next century, Congress was asked for and passed more than 100 incident-specific disaster relief laws (Federal Emergency Management Agency, 2010).

In the 1930s, the administration of FDR placed varying authority for diverse aspects of emergencies into various new federal agencies. As an example, the Bureau of Public Roads was empowered to find repairs to highways and bridges damaged by disasters including floods, while the Flood Control Act gave the U.S. Army Corps of Engineers responsibility for dealing with the impact of floods (Federal Emergency Management Agency, 2010).

With the passage of the Disaster Relief Act of 1950 (P. L. 81-875), the President gained the authority to declare disasters, and Congress the authority to grant to the affected states money to aid in recovering from the emergency. The metapolicy devolved into one based less on public safety than on the ability to provide funds and thus gain benefit at the federal level (for giving aid to the recovery) and state level (for getting funds to aid the recovery) (Derthick, 2009).

In 1979, President Carter signed Executive Order 12127 reorganizing the disparate federal disaster agencies (Federal Insurance Administration, the National Fire Prevention and Control Administration, the National Weather Service Community Preparedness Program, the Federal Preparedness Agency of the General Services Administration, the Federal Disaster Assistance Administration activities from Housing and Urban Development, and Civil defense responsibilities from the Defense Department's Defense Civil Preparedness office) into a new Federal Emergency Management Agency (FEMA) (Federal Emergency Management Agency, 2010). FEMA's first director, John Macy developed what was then called the "Integrated Emergency Management System" which stressed an all-hazards approach emphasizing the symbiotic interrelation between natural disaster and civil defense (Federal Emergency Management Agency, 2010). The late 1980s saw a string of mismanaged federal responses to disaster, and in 1993, President Clinton nominated James Witt as the new FEMA director, and FEMA became—briefly—a cabinet level post (Federal Emergency

Management Agency, 2010). While Witt was successful in creating several new initiatives, such as the pre-disaster mitigation grant program, the end of the Cold War resulted in another policy shift and the homeland security role (still called Civil Defense) was deemphasized—and FEMA failed to achieve a high level effectiveness (Derthick, 2009, pp. 4–5). The agency was not structured, staffed, funded, or held responsible for adequate response to or preparation for a truly catastrophic event (Jackson, 2011), which resulted from confused metapolicy across multiple administrations.

Finally, in March 2003, FEMA and 22 other federal agencies, programs and offices were combined into the new Department of Homeland Security, and now the imperatives of natural disaster were deemphasized in favor of the old Civil Defense role in the form of counter terrorism. Once again, the failure to create an apolitical metapolicy resulted in the failure of local, state, and federal response and coordination efforts in the aftermath of Hurricanes Katrina and Rita (Schneider, 2005).

#### **4. New Laws Passed to Deal with the HLS Crisis**

It is for the President to set that course, as in all times of national crisis, and it is for Congress to close ranks behind him. After months without a mandate, President Bush has almost universal public support to do what he considers necessary, and, with a few reservations, lawmakers seem ready to agree. ‘Their role at the moment is to cheer him on, to show unity and give him what he wants...and the public wants that because they are frightened’ (Cochran & Christensen, 2001, p. 2115).

Cochran’s comments in the above quotation are strikingly similar in context to the concept FDR applied to his New Deal reforms justifying any actions due to the times. In the days and months immediately following the 9/11 attacks, the nation struggled to adapt to a new reality in which the oceans no longer protected American shores. Sinclair (2003) found that in the months immediately following 9/11, Congress showed remarkable unity of mind, and the executive branch largely got its way. However, she noted that after that initial rush of not letting “a crisis go to waste,” Congress first began to push back against the executive branch in an effort to preserve Congressional power, as demonstrated in the negotiations, compromises, and sun-setting of parts of the USA PATRIOT Act (Sinclair,

2003, pp. 9–10). The reality documented by Sinclair demonstrates the confusion resulting from inadequate metapolicy. By attempting to use the immediate crisis period to correct a number of perceived problems, the Bush administration ran into the wall of “politics as usual,” and thus, failed to address the HLS issues completely (Sinclair, 2003).

## **5. Establishment of the Department of Homeland Security**

Within a year of the attacks, President George W. Bush created the Office of Homeland Security by executive order. Also, remember that executive orders do not require any approval from Congress. Conley (2003) has noted the interesting fact, however, that Congress almost immediately thereafter began to push for a full cabinet-level department, with all the human and fiscal resources that attend (Conley, 2003, p. 2). The President at first sought complete control over the Homeland Security Office by making it an executive office rather than a department. However, he swiftly worked to preempt Congress by garnering public support, and then by threatening a veto if the proposed department was not created in the manner the President proposed (Conley, 2003, p. 4). The key arguments over this new Department of Homeland Security centered on labor and collective bargaining issues (Conley, 2003, pp. 4–5). Thus, from its outset, the very fabric of HLS metapolicy in America was woven not of the critical cloth of protecting the homeland, but of the partisan commitments of the legislative and executive branches and party politics.

## **6. Funding as Preemption**

The command of the revenues ‘Of a state gives the command of every thing in it. He that has the purse will have the sword, and they that have both, have everything; so that the legislature having every source from which money can be drawn under their direction, with a right to make all laws necessary and proper for drawing forth all the resource of the country, would have, in fact, all power....I shall only remark, that this power, given to the federal legislature, directly annihilates all the powers of the state legislatures. (Brutus, 1787)

Among the findings of the 9/11 Commission, a key concept was the need to base efforts on real risk, and not to turn federal funding into a method of supplanting state



funding (National Commission on Terrorist Attacks Upon the United States, 2004, p. 396). The reality is, as examined earlier, that the tens of billions of dollars spent to date have gone to inconsistent goals based on non-existent definitions. The 9/11 Commission recommended the setting of national priorities (National Commission on Terrorist Attacks Upon the United States, 2004, p. 395) but such priorities have changed.

Despite the recommendations of the commission, the risk formula and distribution of grant funding is more attuned to political pressures (United States Congress, House, Democratic Members of the House Select Committee on Homeland Security, 2004; United States Congress, House, Select Committee on Homeland Security, 2004).

Use of grants for operational costs was approved under specific circumstances. However, the “color code” system of the now-defunct Homeland Security Alert System (HSAS) was unclear and officials wavered between determining that the greatest risk was to the large urban cores (National Commission on Terrorist Attacks Upon the United States, 2004, pp. 395–96) and softer targets in the so-called heartland (Reese, 2005, pp. 8–10).

Grant funding of state and local HLS activity might be viewed as another example of the preemption of state and local responsibility by the federal government. It might be argued that a critical need at the local level in HLS is for personnel to execute the various tasks. Clovis (2006) in fact found that the need for personnel and money is the most significant difficulty local and state governments face in building capacity to cope with modern HLS needs. However, the use of federal grant funds for this purpose has been contested as supplanting states’ responsibilities to their own residents (Ridge, 2003a).

The sheer number of federal grants (see Table 4), and the requirements on the states tied to these grants, have not allowed states the latitude to identify or access what *they* need locally in a quickly or efficiently manner (Mayer & Carafano, 2007). The fact is, however, that not enough resources exist to meet all of the federal requirements on the states to build capacity and capability (Clovis, 2008c).

The misuse of risk in the federal calculus has lead to a misalignment of HLS missions at the state/local and federal levels (Clovis, 2008b). As noted in this thesis, the

federal HLS concentration has been, and remains, terrorism while the states continue to confront terror as one of many hazards that they must address on a daily basis<sup>8</sup> (Clovis, 2008b, p. 6). In fact, an examination of the 654 federal reports generated between April 1997 and July 20, 2011 on file with GAO, only 10 deal with disasters without also mentioning terrorism, only one mentions “all-hazard,” while 90 *specifically* mention terrorism in their titles, and more than 800 deal with equipment, processes, policy, etc. aimed at terrorism response or prevention (United States Government Accountability Office [GAO]).

The capability requirements (Responder Knowledge Base [RKB], 2011a) placed on the states by DHS are significant. The federal mandate that local areas work together regionally is yet another preemption attempt by the executive branch and is at best of questionable constitutionality (Clovis, 2008c).

As FDR realized during the formation of his New Deal policies, federal funding creates a powerful line of control over local activity. Where the New Deal implemented this control via the formation of new federal agencies and laws, the HLS crisis has spawned a plethora of grant streams and mandates. States and localities eager to gain what they might consider to be their “share” have flocked to the siren call of cash. Table 4 lists nearly 30 DHS-funded grant programs for FY2011. Additional programs are funded through the departments of Health and Human Services; Justice; and others.<sup>9</sup>

Table 4. HLS Grant Programs FY2011. (From: Responder Knowledge Base [RKB], 2011b)

PROGRAMS	DESCRIPTION
Buffer Zone Protection Program (BZPP)*	Provides funding to increase the preparedness capabilities of jurisdictions responsible for the safety and security of communities surrounding high-priority pre-designated Tier 1 and Tier 2 critical infrastructure and key resource (CIKR) assets
Citizens Corps Program	Bring community and government leaders together to

<sup>8</sup> This is the so-called “all-hazards” approach.

<sup>9</sup> Through FY2010, the U.S. Department of Education offered the Readiness and Emergency Management for Schools grant along with other general safety grants for local schools (Responder Knowledge Base [RKB], 2011b).

<b>PROGRAMS</b>	<b>DESCRIPTION</b>
(CCP)*	coordinate community involvement in emergency preparedness, planning, mitigation, response and recovery
Community Assistance Program State Support Services*	Provide, through a state grant mechanism, a means to ensure that communities participating in the National Flood Insurance Program (NFIP) are achieving the flood loss reduction objectives of the NFIP
DHS—Science and Tech Solutions*	Provide information, resources and technology solutions that address mission capability gaps identified by the emergency response community
Domestic Preparedness Equipment Technical Assistance Program*	Technical assistance program for emergency responders
Drivers License Security Grant Program (DLSGP)*	Address a key recommendation of the 9/11 Commission to improve the integrity and security of state-issued driver's licenses (DL) and identification cards (ID)
Emergency Management Performance Grant (EMPG)*	Assist state and local governments in enhancing and sustaining all-hazards emergency management capabilities
Emergency Operations Center Grant Program (EOC)*	Improve emergency management and preparedness capabilities by supporting flexible, sustainable, secure, and interoperable Emergency Operations Centers (EOCs) with a focus on addressing identified deficiencies and needs
Equipment Purchase Assistance Program (EPAP)*	Purchase of DHS authorized equipment acquisitions is facilitated by EPAP by way of links with existing acquisition offices of the federal government
FEMA Preparedness Technical Assistance Program*	Designed to be an agile program that addresses areas of greatest state and local need; is committed to transferring and institutionalizing knowledge at the state and local level; and provides a dynamic menu of services responsive to national priorities
Hazard Mitigation Grant Program (HMGP)*	Provides grants to states and local governments to implement long-term hazard mitigation measures after a major disaster declaration. Authorized under Section 404 of the Stafford Act and administered by FEMA, HMGP was created to reduce the loss of life and property due to natural disasters
Homeland Security Grant Program (HSGP)*	Provides funds to build capabilities at the state and local levels and to implement the goals and objectives included in state homeland security strategies and initiatives in their State Preparedness Report
Intercity Bus Security Grant Program (IBSGP)*	One of five grant programs that constitute the Department of Homeland Security (DHS) Fiscal Year (FY) 2010 focus on transportation infrastructure security activities.

<b>PROGRAMS</b>	<b>DESCRIPTION</b>
Intercity Passenger Rail Program (AMTRAK)*	Create a sustainable, risk-based effort to protect critical surface transportation infrastructure and the traveling public from acts of terrorism, major disasters, and other emergencies within the Amtrak rail system
Interoperable Emergency Communications Grant Program (not in 2011)	To improve interoperable emergency communications, including communications in response to natural disasters, acts of terrorism, and other man-made disasters
Law Enforcement Officer Reimbursement Agreement Program*	Part of the cooperative effort between (Transportation Security Administration (TSA) and airports to support deployment of sufficient law enforcement officers, by airports, to ensure passenger safety and counter risks to transportation security
Law Enforcement Terrorism Prevention Activity (LETPA-SHSP)*	Carves out 25% of state HLS grants to focus upon the prevention of terrorist attacks and provides law enforcement and public safety communities with funds to support intelligence gathering and information sharing
Law Enforcement Terrorism Prevention Activity (LETPA-UASI)*	Carve out of 25% of each local UASI grant to focus upon the prevention of terrorist attacks and provides law enforcement and public safety communities with funds to support intelligence gathering and information sharing
Metropolitan Medical Response System Program (MMRS)*	Supports the integration of emergency management, health, and medical systems into a coordinated response to mass casualty incidents caused by any hazard
Nonprofit Security Grant Program (NSGP)*	Support for target-hardening activities to nonprofit organizations that are at high risk of a terrorist attack and are located within one of the specific FY2010 UASI-eligible urban areas
Operation Stonegarden Grant Program (OPSG)*	Enhance cooperation and coordination among local, state and federal law enforcement agencies in a joint mission to secure the U.S. borders along routes of ingress from international borders to include travel corridors in states bordering Mexico and Canada, as well as states and territories with international water borders.
Port Security Grant Program (PSGP)*	Create a sustainable, risk-based effort to protect critical port infrastructure from terrorism, particularly attacks using explosives and non-conventional threats that could cause major disruption to commerce
Pre-Positioned Equipment Program*	Provide all-hazards response to local and state responders
Regional Catastrophic Preparedness Grant Program*	Enhance catastrophic incident preparedness in selected high-risk, high-consequence urban areas and their surrounding regions.

<b>PROGRAMS</b>	<b>DESCRIPTION</b>
State Homeland Security Program (SHSP)*	Provides funds to build capabilities at the state and local levels and to implement the goals and objectives included in state homeland security strategies and initiatives in their State Preparedness Report
Transit Security Grant Program*	Funds for state, local and territorial governments and private sector entities to strengthen the nation's transportation infrastructure and protect the traveling public from acts of terrorism and other major disasters.
Tribal Homeland Security Program*	Provide funding directly to eligible tribes to help strengthen the nation against risks associated with potential terrorist attacks
Urban Areas Security Initiative Program*	Directly supports the national priority on expanding regional collaboration in the national preparedness guidelines and is intended to assist participating jurisdictions in developing integrated regional systems for prevention, protection, response, and recovery

Programs marked with an \* were also funded in FY2010

Table 5. Legal Citation to GPD Programs (From: Reese, 2009, p. 10)

<b>Programs</b>	<b>Citation</b>
State Homeland Security Grant Program	6 U.S.C. 605
Urban Area Security Initiative	6 U.S.C. 604
Transit Security Grant Program	6 U.S.C. 1135, 1163
Port Security Grant Program	46 U.S.C. 70107
Freight Rail Security Grant Program	6 U.S.C. 1163
Intercity Passenger Rail Program (Amtrak)	6 U.S.C. 1163
Intercity Bus Security Grant Program	6 U.S.C. 1182
Buffer Zone Protection Program	P.L. 111-83, Title III. 123 Stat. 2159.
Metropolitan Medical Response System	6 U.S.C. 723
Assistance to Firefighters Program	15 U.S.C. 2201 et seq.
Regional Catastrophic Preparedness Grant Program	P.L. 111-83, Title III, 123 Stat. 2158.
Citizen Corps Programs	P.L. 111-83, Title III. 123 Stat. 2158.
Emergency Management Performance Grants	42 U.S.C. 4001 et seq, 42 <u>U.S.C.</u> 5121 et seq, 42 U.S.C. 7701 et seq
Public Safety Interoperable Communications Grant Program	6 U.S.C. 579
Emergency Operations Center Grant Program	42 U.S.C. 5196c

## 7. Oversight of DHS—More Than DoD

In addition to the power shifts conveyed by grants, Congress has sought other controls, which further demonstrates the metapolicy flaws. Approximately 108 Congressional committees and sub-committees with oversight of the Department of Homeland Security exist (see Figure 1).

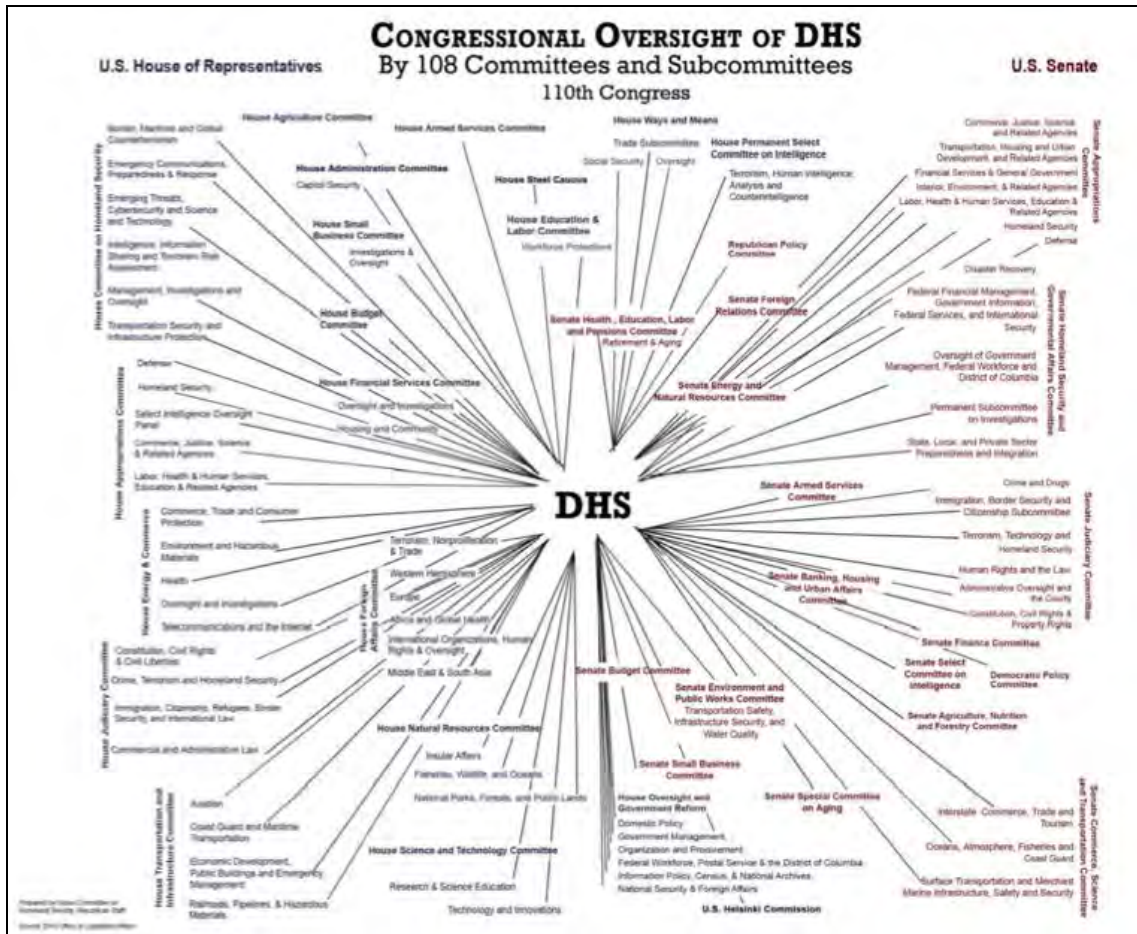


Figure 1. Congressional Oversight of DHS. (From: United States Department of Homeland Security, 2010c, p. 70)

By 2004, the GAO had catalogued 114 strategic recommendations from congressionally chartered commissions on HLS, nearly 60 strategic GAO recommendations, and six distinct mission areas within the National Strategy for Homeland Security (United States General Accounting Office, 2004). In May 2011, the

Associated Press reported that in 2009, DHS officials say they gave over 2,000 briefings and sent more than 200 witnesses to 166 Congressional hearings at a cost of some \$10 million (Associated Press, 2011).

## **8. Laws and Activities**

Following World War II, Congress passed the National Security Act in 1947 (50 USC Ch. 15, Sec. 401) to “provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security...” (Georgetown Law Library, 2009). The act has been amended over the years, most recently by the USA PATRIOT Act, the Intelligence Reform and Terrorism Prevention Act of 2004, and the National Security Intelligence Reform Act of 2004 (Georgetown Law Library, 2009).

It can be argued that modern HLS legislation began based on the terrorism threat before 9/11. Perhaps the first of effort came in June 1995 when President William Clinton issued Presidential Decision Directive (PDD) 39.

It is the policy of the United States to deter, defeat and respond vigorously to all terrorist attacks on our territory and against our citizens, or facilities, whether they occur domestically, in international waters or airspace or on foreign territory....It is the policy of the United States not to make concessions to terrorists....The United States shall seek to deter terrorism through a clear public position that our policies will not be affected by terrorist acts and that we will act vigorously to deal with terrorists and their sponsors. Our actions will reduce the capabilities and support available to terrorists....If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government. (White House, 1995)

In 1998, the President issued PDD 63, which established the national priority of protecting the critical infrastructure and key resources of the United States (White House, 1998). PDD 63 also recognized that HLS would require interface with the private sector,

and established an FBI National Infrastructure Protection Center and the sector-specific Information Sharing and Analysis Centers (ISAC) that persist today (White House, 1998).

These two directives, however, placed responsibility for various factors of each initiative under the guidance of separate federal agencies. Neither clearly recognized the importance of the role of the state and local governments in the effort.

The division of labor made sense at the time, given the paradigm within which the U.S. Government functioned. As seen during the New Deal and after, the structure of the U.S. federal government required that specialized federal agencies address individual stovepipes of effort. These institutional stovepipes exacerbated the walls that made information sharing and cooperation difficult, as recognized by the National Commission on Terrorist Attacks upon the United States. In the *9/11 Commission Report*, the commissioners noted that one of the biggest problems leading to 9/11 was the fact that so many federal agencies were politically entitled to “cast iron stovepipes” and unwilling to relinquish institutional control (National Commission on Terrorist Attacks Upon the United States, 2004, p. 403).

In 1999, the Hart-Rudman Commission and the Gilmore Commission began meeting and over the course of their operations issued several reports. The upshot of the reports was a recognition that terrorism—both domestic and foreign incited—was a clear and present danger, and that the terrorists would not be likely to use conventional warfare techniques against the United States (Hart-Rudman Commission, 1999; Gilmore Commission, 1999). The Gilmore commission, in their 2003 final report, noted clearly that activity to secure the homeland must not be limited to the threat of terrorism, and that ongoing resource support would be needed (Gilmore Commission, 2003). Thus, as was the case in the years immediately preceding the financial crisis of the Great Depression, the signs were evident that a crisis was coming. As in the New Deal, the response to crisis was again to promulgate laws without adherence to cohesive metapolicy.

Among the many legislative efforts in HLS law, several serve as clear examples of HLS metapolicy. In Table 6, five of these are noted specifically. The summaries of



these five demonstrate the wide-ranging effects of each. Even if one limits the scope of metapolicy to antiterrorism, these examples show that a wider range of effect was sought in the passage of these laws than simply coping with the terrorism crisis.

Table 6. Five Laws Demonstrating HLS Metapolicy. (From: Georgetown Law Library, 2009)

1. <i>Foreign Intelligence Surveillance Act of 1978</i> , P.L. 95-511, 92 Stat. 1783, codified as amended at 50 U.S.C. § 1801 et seq. The Foreign Intelligence Surveillance Act governs collection of counterintelligence information within the United States. FISA places restrictions on the surveillance of “foreign powers” and their “agents” within the United States, and created the Foreign Intelligence Surveillance Court (which grants or denies Justice Department requests for surveillance orders) and the Foreign Intelligence Surveillance Court of Review (which reviews the decisions of the Foreign Intelligence Surveillance Court).
2. <i>Homeland Security Act of 2002</i> , P.L. 107-296, 116 Stat. 2135 (2002). The Homeland Security Act of 2002 created the Department of Homeland Security and moved certain existing agencies (including the Immigration and Naturalization Service, which was renamed the Bureau of Citizenship and Immigration Services, and the Federal Emergency Management Agency) under its authority.
3. <i>Intelligence Reform and Terrorism Prevention Act of 2004</i> , P.L. 108-458, 118 Stat. 3638 (2004). The Intelligence Reform and Terrorism Prevention Act of 2004 amended the National Security Act of 1947 (below) to create the Office of the Director of National Intelligence. It also authorized various agencies to make regulations on minimum standards for federal acceptance of drivers licenses and personal identification cards (Department of Transportation), minimum standards for federal use of birth certificates (Department of Health and Human Services), verification of documents provided by applicants for social security numbers and limits on the issuance of replacement social security cards (Social Security Administration).
4. <i>National Emergencies Act</i> , Pub. L. 94-412, 90 Stat. 1255, codified as amended at 50 U.S.C. § 1601 et seq. The National Emergencies Act provides for presidential declaration of national emergencies and the termination of such emergencies, for purposes of the expansion of federal executive powers.
5. <i>USA PATRIOT Act of 2001</i> , P.L. 107-56, 115 Stat. 272. The USA PATRIOT Act amended numerous federal laws, as well as creating new ones. The primary effects of the USA PATRIOT Act were the following: (1) to define several new terrorism-related federal crimes, (2) to enhance penalties for existing terrorism-related crimes, (3) to expand investigative surveillance powers, (4) to improve border control by increasing funding and expanding the grounds for excluding and deporting aliens, and (5) to provide for a fund to compensate the victims of terrorism

The federal government was not alone in reacting to the HLS crisis with a spate of laws. Within a year after the attacks of 9/11, at least 33 states had passed legislation creating new crimes and penalties related to terrorist activity (Lyons, 2002, p. 1). Each state also had established homeland security advisors or departments, in addition to their existing emergency management agencies (Logan, 2009; Ridge, 2003b).

## **9. USA PATRIOT Act of 2001**

Arguably, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act is one of the most controversial laws in recent American history (Sinclair, 2003; Podesta, 2002). From a metapolicy standpoint, the law sought to provide homeland security by combating terrorism, and correcting decades of “mistakes” in law enforcement and intelligence. In light of the operational definition of homeland security, the act—while addressing real problems—was so broad as to fail to achieve the homeland security goal (although it could be argued as to whether or not the act corrects the legal shortcomings).

Much of the act was concerned with updating surveillance capabilities in light of 21st century technology, and providing law enforcement with new investigative techniques and powers. The law provided for the sharing of information and codified that many existing techniques (i.e., pen registries) were updated to reflect modern methodologies.

However, the law was—and remains—the subject of much concern. Former White House Chief of Staff John Podesta wrote summarizing some of the popular concerns that the law would lead to abuse by law enforcement and violations of American’s human rights by the law enforcement and the intelligence community (Podesta, 2002). The act modified or clarified many existing laws, not the least of which was the Foreign Intelligence Surveillance Act (FISA) (50 U.S.C. §1801–1862), which addressed the ability of law enforcement and the intelligence community (IC) to use electronic surveillance of persons who may be involved in foreign-based threats to the United States.

Attorney General John Ashcroft interpreted the USA PATRIOT Act as modifying FISA as “expressly” addressing the barrier to intelligence sharing. He stressed in clear language that intelligence officers and law enforcement should not only share, but also collaborate on investigations (Ashcroft, 2002). In spite of the clear intent of the USA PATRIOT Act to reduce barriers to information sharing between the IC and law enforcement, the entrenched process of protecting power by protecting information continued.

In November 2002, the Court of Appeals ruled that the FISA court attempted to codify this barrier (310 F.3d 717 (2002) in Re: Sealed Case). The United States Foreign Intelligence Surveillance (FISA) Court of Review reversed a lower FISA court decision and clearly indicated the continuing existence of this problem despite clear evidence of the intent (310 F.3d 717 (2002) in Re: Sealed Case).

Demonstrative of a metapolicy aimed at dealing with everything in the name of homeland security, the USA PATRIOT Act is extremely broad. The act addresses a myriad of problems by couching it all in the language of HLS. Changes to criminal investigations, surveillance, protection, foreign intelligence investigation, money laundering, border protection, deportation and detention of aliens, rights and responsibilities of victims, and the institutional capacity of federal law enforcement to deal not only with terrorism, but other crimes (sec 205) (Doyle, 2002).

Section 218 substantially changes the FISA warrant process (Podesta, 2002). It modifies the older FISA language, such that a clandestine FISA warrant can be issued if the investigation includes the collection of foreign intelligence as “a significant purpose” (Doyle, 2002). Under the older FISA rules, such foreign intelligence gathering had to be “the purpose” of an investigation under a FISA warrant (Podesta, 2002).

#### **D. EVENTS IMPACT HLS METAPOLICY**

The other seminal event in HLS metapolicy history was the catastrophic impact of Hurricanes Katrina and Rita on the Gulf Coast of the United States in 2005. The concentration on terrorism in the aftermath of 9/11 ignored the perennial disregard by

policy makers (particularly at the federal level) for issues of the management of catastrophic natural hazards (Waugh, 1991).

Following the hurricanes, the federal government (as might be cynically observed) fell back on the tried and true methodology for coping with crisis and established commissions, laid blame, and developed law. Waugh (1991) referred to this as a crisis driven policy window through which the federal government acts after the fact. Uneven local capability and disparate understanding of the expected roles of the different levels of government in the HLS enterprise contribute to the environment that leads to this situation (Waugh, 2006).

The Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina (2006) asserted that institutional government failures were responsible for undermining the actions of individuals and agencies that simply seized initiative (Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, 2006). However, the federal government is not, and should not be, a first responder (Brown, 2005). As Clovis (2007) asserted, the fact that HLS is national in nature does not make federal response the only key responsibility. Mayer and Carafano (2007) also recognized the need for Congress to restore HLS, and specifically DHS, to a federalist functionality and focus on the national-level concerns.

The failure of the day-to-day constructs of government is a vulnerability most keenly applicable to states and localities immediately overwhelmed by catastrophic events (Clovis, 2008c). These entities seek to mitigate their vulnerabilities at a local level and turn to the federal government for assistance when becoming overwhelmed is likely.

That some persons and agencies took extraordinary initiative and acted outside of their normal chains of command or inclination is an expected observation of chaos theory (Levy, 1994) and is not particularly germane. What is germane is the observed failure of officials at the local (and state) levels to plan adequately for catastrophe (Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, 2006).

The local, parish, and state governments all failed to act appropriately, and federal response was thus hindered (and for various other reasons, not well coordinated) (Schneider, 2005). Citing public-choice theory (that both government and the private sector are motivated strictly by self interest), Sobel and Leeson argued that the federal government deserves the blame for the problems after Hurricane Katrina as layers of federal bureaucracy and “glory seeking” government officials failed their constituents (Sobel & Leeson, 2006). Their argument, however, presupposes that in the United States, it is the *federal* government’s responsibility to cope with all problems at all levels—and gives additional momentum to Khoury’s concept of domestic realism.

However, disaster experts recognize that responses to crisis of this scope are an intergovernmentally shared responsibility—and issues surrounding Hurricane Katrina—are more indicative of flawed metapolicy and lack of definition of HLS than of a federal failure (Birkland & Waterman, 2008), and as noted above, other scholars have asserted that federal response is not equivalent to national need (Waugh, 1994; Mayer & Carafano, 2007; Clovis, 2008c; Derthick, 2009).

Despite the local nexus for the problems (Waugh & Streib, 2006), the development of new federal regulations in the form of the Post Katrina Emergency Management Reform Act was the result.

The October 2006 PKEMRA was designed as a massive overhaul of federal preparedness and response to disaster (Baca, 2008). The act created a new National Preparedness division within FEMA (United States Department of Homeland Security, 2011). The new division encompassed most of what FEMA had done in the past and several programs from the now-defunct Preparedness Directorate of DHS (United States Department of Homeland Security, 2011); however, the National Protection and Programs Directorate of DHS remained untouched by PKEMRA (United States Department of Homeland Security, 2011).

The major beneficial effect of the changes to FEMA wrought by PKEMRA compliance is the integration of preparedness across all FEMA mission spaces and hoped-for enhanced collaboration between several states and the FEMA regions

(Springer, 2011). Springer (2011) found, however, that the advent of PKEMRA has done nothing to create a better risk management framework or to engender long-term sustainability of national resiliency or preparedness (Springer, 2011). If the goal of PKEMRA was reorganization and a change in rhetoric, it has achieved a fair measure of success. If the goal was enhanced resiliency and increased preparedness, the jury is clearly still out. The 2011 “whole community approach” initiated by FEMA Administrator Craig Fugate is a public statement of the need to respect the federalism genius of national preparedness. Federal agencies and money can be leveraged to support the local response—to be coordinated at that level—and to meet the needs of the states and localities (Fugate, 2011).

## VII. CONCLUSIONS AND COURSES OF ACTION

What does the death of an elephant reveal about the value of going to an air-raid shelter? (Bernstein, 1998)

In his book *Against the Gods*, economist Peter Bernstein (1998) told the story of a Soviet statistician who, during World War II air raids on Moscow, refused to go to an air-raid shelter due to the mathematical improbability of a bomb killing him out of all the people in Moscow. He changed his mind when a bomb killed the only elephant in the Moscow zoo. According to Bernstein, when asked why he had changed his mind the statistician replied, “there are seven million people in Moscow and one elephant. Tonight they got the elephant” (Bernstein, 1998, p. 116). Apparently, when the unlikeliest thing occurred, the perception of fear engendered was sufficient to cause a total change in behavior.

In the discussion of risk in Chapter II, data were presented indicating that the nation is more likely to suffer disastrous or catastrophic loss from natural causes than from a terrorist attack. The National Oceanographic and Atmospheric Administration (NOAA) reported that for the nine years following the 9/11 attacks, the nation averaged five natural disasters with loss of greater than \$1 billion each year (NOAA Satellite and Information Service, 2011). Through May 2011, NOAA recorded eight such events, totaling over \$32 billion in loss—the greatest amount since record keeping began (average = \$6 billion/yr.). Clearly, the black swans have come home to roost.

Table 7. Natural Disasters with Loss > \$1 Billion since 9/11 (From: National Oceanographic and Atmospheric Administration, NOAA Satellite and Information Service, 2011)

Year	Event	Impact in US\$ (billions)/Deaths
2010	Midwest tornadoes and severe weather (May 2010)	\$3.0/3
	Mid-South flooding and severe weather (April/May 2010)	\$2.3/32
	Northeast flooding (March 2010)	\$1.5/11

<b>Year</b>	<b>Event</b>	<b>Impact in US\$ (billions)/Deaths</b>
2009	Drought (Year)	\$5.0/unk
	Western wildfires (Summer/Fall)	\$1.0/10
	Midwest, South, East severe weather (June)	\$1.2/0
	South/Southwest tornadoes (April)	\$1.2/6
	Midwest/southwest tornadoes	\$1.0/0
	Southeast/Ohio Valley severe weather	\$1.4/10
2008	Drought	\$2.0/unk
	Hurricane Ike (Sept)	\$27.0/112
	Hurricane Gustav (Sept)	\$5.0/43
	Hurricane Dolly (July)	\$1.2/3
	U.S. wildfires (Summer/Fall)	\$2.0/16
	Midwest flood (June)	\$15.0/24
	Severe weather/tornadoes (June)	\$1.1/18
	Midwest/Ohio Valley severe weather (May)	\$2.4/13
	Southwest/Midwest tornadoes (Feb)	\$1.0/57
2007	Great Plains and Eastern drought	\$5.0/unk
	Western wildfires (Summer/Fall)	\$1.0/12
	Spring freeze (April)	\$2.0/0
	East/South severe weather	\$1.9/9
	California freeze (Jan)	\$1.4/1
2006	Wildfires	\$1.0/28
	Drought (Spring/Summer)	\$6.2/unk
	Northeast floods (April)	\$1.0/20
	Midwest/ Southeast tornadoes (April)	\$1.5/10
	Midwest/Ohio Valley tornadoes	\$1.1/27
	Storms (March)	\$1.0/10
2005	Hurricane Wilma (Oct)	\$17.1/35
	Hurricane Rita (Sept)	\$17.1/119
	Hurricane Katrina (August)	\$133.8/1,833
	Hurricane Dennis (July)	\$2.1/15
	Midwest drought (Spring/Summer)	\$1.1/0
2004	Hurricane Jeane (Sept)	\$7.7/28
	Hurricane Ivan (Sept)	\$15.4/57
	Hurricane Frances (Sept)	\$9.9/48
	Hurricane Charley (Aug)	\$16.5/35
2003	So. Cal wildfires (Oct/Nov)	\$2.8/22
	Hurricane Isabel (Sept)	\$5.6/55
	Severe storms (May)	\$3.4/51
	Severe storms/hail (April)	\$1.6/3
2002	Drought	\$10.0/0
	Wildfires (Spring/Fall)	\$2.3/21
	Severe Weather (April/May)	\$1.9/7



Given these facts (both monetary and human), and given that HLS is not synonymous with terrorism, a reasonable question possible to ask is *why spend \$39 billion on terrorism when other hazards are far more likely, far more costly, and more likely to affect any location?*

While seemingly irrational, this spending phenomenon is explainable in part by the “utility theory” promulgated in 1738 by Daniel Bernoulli (Poundstone, 2006, pp. 184–187). Utility explained why people risk much for unlikely gains via logarithmic analysis of risk and perception of value (Zabell, 1990, pp. 12–13). In essence, utility theory postulates that the value of something risky is set more by opinion than fact. Terrorism is feared because of an individual’s perceptions of it—its intentionality of horror. America suffers more likelihood of loss from nature yet national perception places more value on the utility of coping with terror. Were resources infinite, this might be an appropriate response—and would certainly fit the Bernoullin theory. Utility theory shows that someone might gamble a great deal of money for the chance of large gain, despite the infinitesimal possibility of actually reaching that gain (Zabell, 1990). The theory demonstrated that precisely because of the perception of the worth of the gain compared to the price (Zabell, 1990). As Bernstein (1998, p. 105) summarized, people with a fear of lightning tremble during thunderstorms due to the weight they place on the consequences of being struck, even though the odds of their being struck are miniscule.

## **A. CONCLUSIONS**

The research points to four conclusions. First, by failing to assess risk adequately (as discussed in Chapter III) and by applying political considerations to the development of crisis policy (as shown in Chapters V and VI), the national metapolicy developed around HLS is fatally flawed. Favoring the perception of risk of terrorism as its genus rather than addressing the real risks (as utility theory predicts), the funds to date have achieved limited goals that cannot be definitively linked to enhanced national resiliency (United States, Congress, House, Committee on Homeland Security, 2009). The current economic reality is likely to make continuing support of the effort difficult if not impossible. As the research shows, the funding provided so far has developed programs

based on a federally identified need and without adequate processes for local sustainability (United States Congress, House, Committee on Homeland Security, Subcommittee on Emergency Communications, Preparedness and Response, 2009).

Secondly, the U.S. government must reach a single, consistent, definition of the national HLS enterprise. Without this step, the research shows nothing to indicate that the nation can reach any effective endpoint. The multiple initiatives being crafted under the auspices of HLS until now are not without intrinsic worth. No data suggests that scrapping these projects will be beneficial. However, neither does the data suggest that these projects are achieving goals set by any specific direction.

The research further suggests that due to the failure to date to analyze the nation's risk adequately (and the complete ignoring of vulnerability), federal policy is, and will be, merely to preempt additional prerogatives as the "easiest" course. Nothing in the literature leads to a belief that the enterprise as currently constructed is achieving the goal of a more secure America.

Finally, the research is clear that the U.S. government continues to respond to periods of crisis in a manner not suited to solving the problems at hand. These pessimistic outcomes are addressable, however. As examined in Chapters V and VI, when the crisis is amorphous—such as "the great depression" or "the war on terror"—the fallback position has been and remains to address multiple issues in the name of the crisis and to seek the expansion of power to do so.

## **B. COURSES OF ACTION**

Any COA must fit into a realistic paradigm if any hope of success is to be expected. It might be tempting to suggest that removing Congressional oversight or massively increasing spending would "solve the problems" of the HLS enterprise. Similarly, suggesting that all initiatives started to date should be abandoned, or disbanding the DHS, ignores the impacts of the funds already expended. At the same time, however, it is necessary to admit that some political will and change are needed.

## **1. Definitions**

- Course of Action: Deciding on a definition for the HLS enterprise is within the political capability of the federal government and is a critical need.

This thesis has proposed one definition that recognizes the reality of the expenditures in money and effort to date, and recognizes the political realities of the United States. As simple as defining the problem might sound, declaring that something is not “homeland security” but is, in fact, another legal or social change will increase the scrutiny of that suggestion, which will limit or eventually eliminate some initiatives and will have political implications.

Determining a definition will not in-and-of itself eliminate Congressional oversight roles, and thus, is politically viable. While the research does indicate that Congress overregulates the Department and the enterprise of Homeland Security, it also recognizes that political realities exist.

## **2. A Federalist Approach to Resiliency**

- Course of Action: Emphasis on building, enhancing, and maintaining preparedness and response programs in all 50 states (and all territories) geared to ensuring resiliency.

Nationwide, coordinated *programs*, not departments, need to be the goal. The concept here is that by building national resiliency, the effects of the black swan events are best protected against while rationally coping with the situations most likely to affect the nation. Standards already exist (Emergency Management Accreditation Program [EMAP], 2010) that could be used to guide this effort at the state level. Related standards for private sector enterprises also exist (National Fire Protection Association [NFPA], 2010). States’ efforts to meet these standards could be individualized via a funding model less directed at preemption than is the current model.

The major efforts need to be funded through collaborative efforts at the state and county/county-analogue level (see Waugh, 1994; Woolhandler & Collins, 2009). National resilience goals should be set, but achieving resilience is a state/local endeavor and efforts should recognize this fact.

### **3. A Federalist Approach to HLS Funding**

- Course of Action: Federal fiscal support to the states and counties, while necessary to achieve national-level goals, should be restructured using block grants and/or cooperative agreements.

The more than \$39 billion spent to date has not been completely wasted. This fact is evident simply because—at least to a great extent—the training and purchasing in support of enhanced hazardous materials, chemical, biological, radiological, nuclear, and explosive (CBRNE), anti-terrorism, intelligence gathering and sharing, etc. were all needed (United States, Congress, House, Committee on Homeland Security, 2009). However, as Congress and the Department of Homeland Security have publicly suggested, (United States, Congress, House, Committee on Homeland Security, 2009), the nation cannot truly measure these improvements. As noted earlier, without a definition of what is being measured, metrics are less than helpful. If all states and territories are able to assist each other in times of need, and reduce the likelihood and impact of disasters, the nation is more resilient.

A logical course for building comprehensive resiliency would be for each state to determine its needs irrespective of monetary awards, but based on standardized goals. Next, the federal government should distribute block grants to, and/or forge cooperative agreements with the states and territories to meet those specific goals. The states, keeping to their federal constitutional responsibility, and meeting their individual state constitutional responsibilities, could then mete out funds for projects to reach those goals. Achieving and maintaining standards of resiliency constitutes measurable outcomes.

The federal government must, of course, direct/coordinate certain projects to achieve national capability. It is unlikely that the individual states will have the financial resources to implement all of the necessary programs. As the HLS enterprise is both a state concern and a national concern, federal funding will continue to be needed.

Research conducted as far back as 1994 clearly showed that the most effective identification and achievement of preparedness goals and activities was at the state and county level with counties and county-analogues as the most logical and responsive repository for emergency management-type functions (Waugh, 1994). As time has passed

and additional crisis successes and failures have shown, collaboration between public and private sectors at the state and county level is the key to identifying gaps and needs for nationwide resiliency (Waugh & Streib, 2006; McManus & Caruson, 2011).

The Center for Strategic and International Studies (CSIS) found that while the United States is better prepared overall than in 2001, despite the many grants, laws, and reorganizations, considerable confusion and many programmatic issues in ensuring America's preparedness still exist (Wormuth & Witkowsky, 2008). Wormuth and Witkowsky based this assessment on the existence of the National Homeland Security Strategy, the training for first responders, the equipment purchased, the existence of the National Response Framework, and other DHS and DoD activities (Wormuth & Witkowsky, 2008).

A best practice for government funding of initiatives is well understood to be based on this concept of allocating scarce resources to invest in successful programs and demonstrable results (Redburn, Shea, Buss, & Quintanilla, 2008). In years during which money were more available, the states could achieve more projects. In years during which resources were limited, states would need to concentrate on limited numbers of projects. However, every project would edge the nation closer to national resilience, which would additionally result in enhanced cooperation among regions within each state, and between states. Such a system would finally allow the American people and Congress to identify progress in the homeland HLS enterprise.

#### **4. Use a Realistic Approach to Risk**

- Course of Action: Strategies for building the HLS enterprise must be based on real assessments of risk that factor in vulnerability and probability.

As documented in the literature, the research is clear that risk formulae used by the federal government to date have been inadequate. Funding for crises has been based on perception, not reality or need. By redirecting funding mechanisms as suggested above, and by requiring that states base their requests on documented risk, the American

HLS enterprise can be reformed to gain the most benefit from work already completed, and to build resilience, response, prevention, and protection capabilities that will better protect America.

And I must tell you, when it comes to predicting the nature and location of our next military engagements, since Vietnam, our record has been perfect. We have never once gotten it right, from the Mayaguez to Grenada, Panama, Somalia, the Balkans, Haiti, Kuwait, Iraq, and more -- we had no idea a year before any of these missions that we would be so engaged. - Former Secretary of Defense Robert M. Gates. (Gates, 2011)

### **C. POTENTIAL FUTURE RESEARCH**

One area for future research would be to verify whether other levels of government or even the private sector might be able to lead or at least contribute to the roles designated by the QHSR as unique to the federal government (United States Department of Homeland Security, 2010a). In the modern world, in which economies are so closely linked and interdependent, and national goals have global impact, responsibility sharing would appear to be inevitable.

A second potential for research would be aimed at validating the conclusions of this thesis. Selecting and examining other “amorphous” crises (other than war with another nation) would be useful to identify the impact of federal preemption on national-level crises further.

The U.S. government is a unique model, unprecedented in world history. In the course of two centuries, the nation has weathered storms that had destroyed other countries—invasion, civil war, social unrest, and economic and national catastrophes. Some of these crises had tangible end goals, such as military victory. Others had more amorphous goals, such as correcting economic collapse.

The 21st century was ushered in with an event that, while predicted, surpassed the anticipation in regard to the shock it engendered. Once again, America is confronted with a crisis that threatens much of the way of life so long developed. This crisis, like the others, is beyond the individual citizen’s ability to solve. Once again, these people turn to

their government for guidance and leadership. Once again, the unique model is tested. And once again, if found wanting, the model could fail the test. Or, the leadership of the nation could again reach for solutions to the problems at hand.

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